Petition

81-590

No. .....

IN THE

Supreme Court of the United States

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October Term, 1981

YVONNE BAGSTAD, on behalf of herself, and all other persons similarly situated,

Petitioner,

vs.

ORANGE COUNTY TRANSIT DISTRICT; JAMES REICHERT; ROBIN YOUNG; PHILLIP ANTHONY; AL HOLLINDEN; WILLIAM FARRIS; RALPH B. CLARK; ANDREW L. LEWIS, Secretary, Department of Transportation; ROBERT H. MCMANUS, Administrator, Urban Mass Transportation Administration; RAY BARNHART, Administrator, Federal Highway Administration,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

On December 13, 1978, petitioner, a mobility handicapped woman filed her complaint against the Orange County Transit District ("Local Respondent" or "Transit District") and the United States Department of Transportation ("Federal Respondent") alleging that on September 19, 1977 the Transit District, with the approval of the Federal Respondent, entered into a contract to purchase 65 mass transit buses without requiring that such buses be equipped with devices that would make them accessible to and usable by physically handicapped persons, despite the fact that passenger buses with accessible equipment for physically handicapped persons were then available. The complaint alleged that such action by the respondents violated three federal statutes: the Urban Mass Transportation Act ("UMTA"), the Federal Aid-Highway Act ("FAHA") and § 504 of the Rehabilitation Act ("Section 504"). The district court dismissed the action on respondents' motion for summary judgment, holding that petitioner was guilty of laches; that the federal statutes did not require the respondents to provide buses which are accessible to handicapped persons; that Section 504 had no application to the case; that the respondents were required only to comply with a regulation issued by the Department of Transportation in 1976, and that respondents had complied with said regulation.

The Court of Appeals affirmed the judgment of the district court *solely* on the ground of laches.

The questions presented are:

1. Whether the courts below erred in concluding, by way of summary judgment — without evidentiary hearing or adequate record — that petitioner, a handicapped woman, and similarly situated mobility handicapped individuals,

were barred by laches from pursuing their action to afford them integrated accessible public mass transportation services, rather than segregated services, when such integrated services could be effectively provided, where:

A. Petitioner, and members of her class, promptly advised respondents of their contention that respondents were required by law to purchase new buses which were accessible to and usable by handicapped persons;

B. Petitioner did not mislead respondents into changing their position;

C. Respondents were not prejudiced by petitioner's alleged delay in filing the complaint;

D. The complaint presents grave and complex legal issues the resolution of which will have a profound effect on tens of thousands of mobility handicapped persons seeking to ride buses in Orange County, California; and

E. Petitioner filed her action well within the period allowed by the statute of limitations.

2. Whether in the interest of judicial economy, and in the exercise of its supervisory power, this Court should decide the following important questions left unanswered by the Court of Appeals:

A. Whether the district court erred in concluding that the UMTA and FAHA did not require that new buses purchased primarily with federal funds be accessible to and usable by mobility handicapped persons.

B. Whether the district court erred in concluding that Section 504 of the Rehabilitation Act did not impose any obligation on the transit district not to discriminate against mobility handicapped persons by providing them with segregated transportation when it was feasible to provide them with integrated transportation.

C. Whether the district court erred in concluding that the regulation issued by the Department of Transportation on April 30, 1976 — which authorized segregated transportation for mobility handicapped persons — was not in conflict with UMTA, FAHA and Section 504.

D. Whether the district court erred in summarily concluding, without evidentiary hearing or adequate record, that the Transit District was in full compliance with the regulation issued by the Department of Transportation in 1976, and all applicable statutes, because the Transit District had allegedly demonstrated genuine good faith progress in planning services for mobility handicapped persons that is reasonable by comparison with the service provided to the general public and that allegedly meets a significant fraction of the actual transportation needs of such persons within a reasonable time period.

E. Whether, contrary to the decisions of this Court, the district court's summary dismissal of petitioner's action violated the standards governing the grant or denial of motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

F. Whether the district court erred in denying petitioner's motion to amend the complaint to include state pendent claims under the standards and criteria enunciated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715.

List of Parties.

The following is a list of all parties appearing before the Court whose judgment is sought to be reviewed: Yvonne Bagstad, on behalf of herself, and all other persons similarly situated; Orange County Transit District, James Reichert: Robin Young, Phillip Anthony; Al Hollinden, William Farris; Ralph B. Clark; Andrew L. Lewis*, Secretary, Department of Transportation, Robert H. McManus*, Administrator, Urban Mass Transportation Administration; Ray Barnhart*, Administrator, Federal Highway Administration.

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*The named federal officials have been substituted for Brock Adams, former Secretary, Department of Transportation, Richard S. Page, former Administrator, Urban Mass Transportation Administration, and William M. Cox, former Federal Highway Administration Administrator, pursuant to Fed. R. App. P. 43(c).

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ORANGE COUNTY TRANSIT DISTRICT; JAMES REICHERT; ROBIN YOUNG; PHILLIP ANTHONY; AL HOLLINDEN; WILLIAM FARRIS; RALPH B. CLARK; ANDREW L. LEWIS, Secretary, Department of Transportation; ROBERT H. MCMANUS, Administrator, Urban Mass Transportation Administration; RAY BARNHART, Administrator, Federal Highway Administration,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Yvonne Bagstad, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed May 6, 1981.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, is reprinted in Appendix A, 1a-3a. It affirmed the judgment of the United States District Court for the Central District of California granting respondents summary judgment. The summary judgment entered by the dis-

trict court is set forth as Appendix B, 4a-5a. The oral findings of fact and conclusions of law granting summary judgment are set forth as Appendix C, 6a-13a.

Jurisdiction.

The opinion and judgment of the Court of Appeals was entered on May 6, 1981. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 26, 1981. A copy of said order is set forth as Appendix D, 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

The three federal statutes involved, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Urban Mass Transportation Act, 49 U.S.C. § 1612, § 165(b) of the Federal Aid-Highway Act, 23 U.S.C. § 142 note, are set forth in Appendix E, 15a-18a.

Statement of the Case.

1. On December 13, 1978, petitioner, a mobility handicapped individual, filed a complaint on behalf of all mobility handicapped individuals living in Orange County, California, against the Orange County Transit District (Local Respondent) and the Department of Transportation (Federal Respondent). The complaint alleged that on September 19, 1977 the Local Respondent entered into a contract to purchase 65 passenger buses without requiring that such buses be equipped with devices that would make them accessible to and usable by physically handicapped persons, this despite the fact that passenger buses with accessible equipment for physically handicapped persons were then available. The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1343, 2201 and 2202. The prayer was for an injunction against the Local Respon-

dent, restraining it from acquiring the 65 buses unless they were made accessible to mobility handicapped persons, and an injunction against the Federal Respondent, enjoining it from releasing any funds to the Local Respondent to operate any mass transportation system not designed for accessibility and effective utilization by mobility handicapped individuals. Declaratory relief and damages were also sought.

The respondents generally denied the allegations of the complaint except that they admitted that the Federal Respondent had made grants to the Local Respondent; that the Local Respondent had entered into a contract for the manufacture of 65 buses "which will not have wheelchair accessibility features" and that the Local Respondent planned to take delivery of the 65 buses "which will not have wheelchair accessibility features." The respondents also alleged three affirmative defenses: failure to state a claim, laches, and failure to exhaust administrative remedies.

2. On June 11, 1979, the district court granted respondents' motions for summary judgment, adopting its oral statement as the Court's final judgment and final findings and conclusions (A. 6a-13a). Judgment was thereafter entered on June 13, 1979 (A. 5a). In its oral ruling granting summary judgment, the Court stated that "there is no bona fide dispute of material fact as to the existence of laches concerning the 65 buses ordered in 1977, and that laches had been demonstrated as to them by defendants as a matter of law." (A. 10a). As an alternate ground, the Court concluded that defendants had complied with all existing law and regulations and "had no obligation to retrofit the 65 buses." (A. 10a); that the Local Respondent had made special efforts on behalf of handicapped persons, and need not make the regular buses accessible to them (A. 11a-12a). The Court agreed with the defendants that neither UMTA, FAHA, Section 504 or the Federal constitution required the

Local Respondent to acquire buses which are accessible to handicapped persons (A. 21a-22a). The Court held that Section 504 had no application to the case because the Department of Transportation (DOT) had not yet issued any regulation implementing Section 504, and that the Section 504 regulation issued by the Department of Health, Education and Welfare (HEW) had no application because the Local Respondent received federal financial assistance from DOT, not from HEW.

The district court included in its ultimate ruling evidentiary material offered in connection with petitioner's motion for preliminary injunction.[1] It is therefore appropriate to touch on some of this preliminary injunction evidentiary material, particularly that portion dealing with the question of "laches." In opposition to petitioner's motion for a preliminary injunction, the Local Respondent submitted a declaration of Patrick H. Butters, manager of maintenance for the Local Respondent from 1976 to 1978. He stated that on February 7, 1977, the Board of Directors of Local Respondent approved the manufacture and the advertisement of bids for the manufacture of buses *without* lifts or other devices which could provide accessibility to said buses for persons confined to wheelchairs. Subsequently, on April 4, 1977, individuals confined to wheelchairs, including the official representative of the Orange County chapter of the California Association of the Physically Handicapped, Inc. gave testimony to the Board of Directors of the Local Respondent in an open public meeting regarding wheelchair accessibility for the subject 65 buses. Following that meeting, on April 18, 1977, after lengthy discussion on the

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[1]Appendix F (18a-23a) sets forth the district court's oral findings of fact and conclusions of law denying petitioner's motion for a preliminary injunction.

subject, the Board amended the specifications made on February 7, 1977 so as to require bidders to submit optional bids; one bid for buses which would be accessible to persons confined to wheelchairs, and a second bid for buses which would not be accessible to persons confined to wheelchairs. On September 19, 1977, the Board of Directors of the Local Respondent awarded a contract to the Flxible Company. The Board elected to accept Flxible's bid in the sum of $6,486,220 for the manufacture of buses which *would not include equipment providing accessibility for persons confined to wheelchairs*. Asserting that a preliminary injunction was not appropriate, Mr. Butters assured the court that "a lift device could be installed (retrofitted) in the front door entrance to the 65 new buses after said buses were delivered" to the Local Respondent if the court should ultimately so order.

Petitioner, in support of the motion for preliminary injunction submitted a declaration on the issue of laches. (Appendix G, 24a-27a). Petitioner swore that the first time she became aware of the fact that the Local Respondent had ordered non-accessible buses was when she read about it in the newspaper after the contract was awarded on September 19, 1977. She learned then that the Board had voted 3 to 2 to purchase non-accessible buses, instead of accessible buses. Shortly thereafter, she spoke to one of the members of the Orange County Board of Supervisors and expressed her outrage at the decision made by the Board of Directors of the Local Respondent. The Supervisor suggested that she speak to another supervisor who was also a member of the Orange County Transit District. On December 14, 1977, petitioner met with the supervisor who was also a member of the Transit District and asked him to reconsider his support for the purchase of 65 non-accessible buses. He advised her that the local transit system was only five years old, and

handicapped persons could not expect it to purchase buses which are accessible to physically handicapped persons. Shortly thereafter, in December 1977, petitioner contacted a deputy attorney general of the State of California and made her protest to him. He suggested that she file a formal complaint with the California Attorney General's office asserting the illegality of the purchase of the non-accessible buses. Petitioner did so. Prior to May 1978, petitioner repeatedly called the deputy attorney general to ask him what action was being taken. He advised petitioner that a complaint was being prepared, and in fact a complaint was filed in May 1978 in the Superior Court for Orange County, State of California. The complaint asserted a violation of state law only, relying primarily on Government Code § 4500.[2] In connection with the filing of said complaint, petitioner executed a declaration dated May 4, 1978 relating her attempt to have the Transit Authority board member change his mind concerning the purchase of the 65 buses. Between the time the state action was filed in May 1978 and the time that the preliminary injunction was denied in the state court, on or about July 17, 1978, petitioner called the California Deputy Attorney General repeatedly making inquiries about the progress of the lawsuit. She was in the courtroom of the state court in July 1978 when the preliminary injunction was denied. Immediately thereafter, she discussed with the Deputy Attorney General what steps he could take to prevent the Transit Authority from taking possession of the disputed

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[2]Government Code § 4500 reads in pertinent part: "Notwithstanding the provisions of any statute, rule, regulation, decision or pronouncement to the contrary, every [governmental or quasi governmental body] . . . in awarding contracts for equipment . . . shall be obligated to require that all rapid transit equipment . . . shall be so built that a handicapped person shall have ready access to, from and in such equipment . . .; provided, however, that contracts for equipment . . . shall be exempt from this requirement until such equipment shall be available from not less than two manufacturers."

buses. He advised petitioner that he would go ahead with the lawsuit. Thereafter, she continued to call him to inquire as to the progress of the case. The Deputy Attorney General advised her that he had served the Transit Authority with interrogatories and would be proceeding with the matter when he received the reply to the interrogatories. He advised petitioner that the attorney for the Transit Authority was continually asking for additional time within which to reply and this was delaying matters. In the middle of October 1978, petitioner attended a conference dealing with the rights of handicapped persons under Section 504. At that conference, she sought and found Stanley Fleishman, an attorney she knew to be active in asserting the rights of people with disabilities. She discussed with Mr. Fleishman the fact that the Transit Authority was about to take possession of 65 buses which would not be accessible to or usable by handicapped persons. She asked him if there was anything that could be done to enjoin the Transit Authority from taking possession of these buses in light of the fact that a preliminary injunction had been denied in state court. Mr. Fleishman suggested that petitioner come to his office after the conference and discuss the matter, and she did so. After Mr. Fleishman advised petitioner that it was his opinion that federal statutes forbade the Transit Authority from purchasing the 65 buses, without appropriate lifts to make them accessible to handicapped persons, petitioner explained that she could not afford to pay attorney's fees to litigate the matter and indeed that she could not even advance costs. She asked Mr. Fleishman whether he would nevertheless be in a position to file an action on her behalf. After considering the matter for a week or two, and after petitioner furnished some additional material concerning the matter, an action was filed on December 13, 1978. From the time petitioner first learned that the Transit Authority

had in September 1977 contracted to purchase non-accessible buses, petitioner "tried in every way [she] knew how to prevent [the Transit Authority] from taking possession of those non-accessible buses the purchase of which [she believed] to be in violation of both federal and state law." (A. 27a).

As already noted, the district court concluded that petitioner was guilty of laches, as a matter of law. The Court of Appeals agreed. Having found petitioner's action barred by laches, the Court of Appeals declined to reach the merits of petitioner's complaint. The Local Respondent has filed a Cost Bill against petitioner in the sum of $1,778.42.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE DISTRICT COURT'S SUMMARY JUDGMENT BARRING PETITIONER'S ACTION FOR LACHES CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS, AND EVEN CONFLICTS WITH OTHER DECISIONS OF THE NINTH CIRCUIT.

Petitioner's detailed affidavit (A. 24a-27a) demonstrates that there has been no undue delay on her part; indeed, she acted expeditiously. Respondents' claim of prejudice is tenuous and unsubstantiated. At the very least, a factual record was presented which precluded summary judgment on this score.

A. The Court of Appeals states that petitioner was guilty of "unreasonable or inexcusable delay" because "a significant period of time passed between the announcement of the intention to purchase the non-accessible buses [February 7, 1977] and the filing of this action [December 13, 1978]" (A. 2a). As pointed out above, however, after the Local Respondent approved specifications for non-accessible buses on February 7, 1977, it changes its mind on April 18, 1977 and called for bids for both accessible and non-accessible buses. It was not until September 19, 1977 (more than 7 months after the February 7, 1977 date used by the Court of Appeals) that the Local Respondent opted for non-accessible buses. From that moment, petitioner tried in every way she knew to prevent the Local Respondent from taking possession of the said buses. She acted diligently and, given her inability to finance a lawsuit, as effectively as she could to prevent the Local Respondent from purchasing non-accessible buses in violation of clear statutory rights of the mobility handicapped to accessible buses.

The Court of Appeals concluded that petitioner's alleged delay resulted in prejudice to the Local Respondent, saying: "The complaint was not filed until the project was near completion. Had Bagstad brought her claim earlier, OCTD [Orange County Transit District], might have ordered accessible buses originally; to retrofit the buses with wheelchair lifts at this time will clearly be more costly and significantly disrupt the operations of the transit system." (A. 2a). Initially, it should be noted that the Local Respondent proceeded in clear violation of state law when it opted to purchase the non-accessible buses. (Government Code § 4500, see, n. 2). Moreover, as petitioner hereinafter demonstrates, UMTA and FAHA, reinforced by Section 504, required that new buses be accessible to handicapped persons. Petitioner respectfully suggests that the Court of Appeals was in error when it measured the alleged prejudice to the Local Respondent by events as they were when the Court of Appeals renderd its decision. When the lawsuit was initiated in December 1978, the buses were still being manufactured. The purpose of the lawsuit was to require the Local Respondent to have the lifts put in the buses before they were shipped to California. Retrofitting the buses at *that* time would have caused no disruption to the transit system. The buses were not shipped to California until some four months after the commencement of the action. When the petitioner filed her motion for a preliminary injunction the buses had not yet been shipped. Moreover, when the respondents were opposing petitioner's motion for a preliminary injunction they assured the court that injunctive relief was not necessary because there would be no difficulty in retrofitting the buses if it was ultimately determined that accessible buses were required.

The Court of Appeals stated that retrofitting "at this time will clearly be more costly" and that had "Bagstad brought

her claim earlier, OCTD (Local Respondent) might have ordered accessible buses originally." (A. 2a). To the extent that retrofitting the buses presents greater problems now than it would have had the Local Respondent acted earlier, it is *not* petitioner's fault. From the outset, she and other members of the handicapped community pushed for accessible buses. Finally, there is *nothing* in the record to support the assertion that retrofitting the buses "at this time" will significantly disrupt the operation of the transit system. Similarly, there is nothing in the record as to how much "more costly" retrofitting will be.[3]

B. In *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 n. 8, the Court "especially noted that caution is called for before laches is applied on summary judgment where the facts have only been developed in affidavits and allegations. See, *Powell v. City of Key West*, 434 F.2d 1075, 1080 (5th Cir. 1970)." The cases are uniform on this proposition. See, *Fowler v. Blue Bell, Inc.*, 596 F.2d 1276, 1280 (5th Cir. 1979) ("We conclude that the facts adduced on Blue Bell's summary judgment motion do not allow findings of either unreasonable delay by Fowler or undue prejudice to Blue Bell. Therefore, the district court's finding that laches bars Fowler's claim was an abuse

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[3]Although the record itself is silent on this point, the Local Respondent stated in its brief in the Court of Appeals that if appropriate lifts had been built into the buses "during intial manufacture, the cost would have been about $6,000 per bus. . . . The cost of . . . retrofitting would add an additional $2,000 per bus. . . ." The non-accessible buses cost $6,486,220. The federal share was 80% of said sum. Since the Local Respondent was only required to pay 20% of the cost of the buses, its share of the additional cost would have come to $400 per bus, for retrofitting the buses. This paltry sum cannot be said to constitute the kind of "undue prejudice" justifying the dismissal of a lawsuit brought by a handicapped person to vindicate the national policy of affording handicapped persons access to integrated public mass transportation, a national policy reflected in the three federal statutes and the constitution itself.

of discretion to locate a just result.''); *Hurs v. United States Postal Service*, 586 F.2d 1197, 1199-1200 (8th Cir. 1978) (action by postal clerk based on First Amendment who was discharged for writing threatening letter to President — suit sought reinstatement — summary judgment granted by district court on affirmative defense of laches, reversed by Court of Appeals — failure of agency to establish undue prejudice — district court should have considered the benefits to plaintiff and the public interest in vindicating the First Amendment rights of public employees, as against claim that Postal Service was unduly prejudiced); *Powell v. City of Key West, Florida*, 434 F.2d 1075, 1080 (5th Cir. 1970) (''Even were the affidavits of the defendants adequate to raise an issue of fact as to prejudice, this is all they would have done because there is clear proof on behalf of the plaintiff from which the trial court could have found a complete absence of prejudice by reason of the delay.'').

The case at bar presents grave legal issues the resolution of which will have a profound effect on all mobility handicapped persons seeking to ride buses in Orange County, California, and beyond. See *Baker v. Bell*, 630 F.2d 1046, 1056 (5th Cir. 1980). In *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980) the Court reversed a judgment dismissing the action on the ground of laches saying:

> ''Laches is not a favored defense in environmental cases. *Cady v. Morton*, 527 F.2d 786, 792 (9th Cir. 1975); *City of Davis v. Coleman*, 521 F.2d 661, 678 (9th Cir. 1975). Its use should be restricted to avoid defeat of Congress' environmental policy. In considering laches' claims, it is relevant that the plaintiff will not be the only victim of possible environmental damage. [Citations] Citizens have a right to assume that federal officials will comply with the applicable law.

> *Cady v. Morton*, 527 F.2d at 792. As we stated in *City of Davis v. Coleman:* 'To make faithful execution of this duty contingent upon the vigilence and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to ensure compliance with NEPA in the first instance.' 521 F.2d at 678." (632 F.2d at 779)

See also, *Arlington Coalition of Trans. v. Volpe*, 458 F.2d 1323, 1328 (4th Cir. 1972), *cert. den.* 409 U.S. 100, (1972); *Shiffler v. Schlesinger*, 548 F.2d 96, 103 (3d Cir. 1977).

The case at bar is in plain conflict with *Coalition for Canyon Preservation v. Bowers, supra*, also decided by the Ninth Circuit. The national policy of "mainstreaming" our handicapped citizens is no less important than the environmental policy involved in *Bowers*. Laches should not be used to defeat Congress' mandate to afford mobility handicapped individuals equal access to mass transportation financed by the federal government.

II.

IN THE INTEREST OF JUDICIAL ECONOMY, AND IN THE EXERCISE OF ITS SUPERVISORY POWER, THIS COURT SHOULD DECIDE THE IMPORTANT QUESTIONS DECIDED BY THE DISTRICT COURT AND LEFT UNANSWERED BY THE COURT OF APPEALS.

The basic question of whether Congress mandated integrated, rather than segregated, transportation for America's mobility handicapped citizens is plainly of enormous importance to society as a whole, and to handicapped individuals. At a recent hearing sponsored by the United States Commission on Civil Rights, Charles D. Goldman, General Counsel, Architectural and Transportation Barriers Compliance Board, analogized the fight by disabled Americans for integrated, rather than segregated, transportation, to the

struggle of the blacks, in the 60's, for integration. He stated: "We learned [in the 60's] that, assuming they could get on it, black people and brown people shouldn't be put on one bus and whites on another. . . . In the 1970's and 1980's we are facing the same issue. . . . Disabled persons are the emerging minority of the 70's and 80's. But we have learned a lesson from the 50's and 60's. We have learned that transportation is more than getting from here to there. We have learned that transportation is a socialization process. We have a truly integrated environment when we have women on the bus, when we have blacks on the bus, when we have brown people on the bus, and when we have disabled people on the bus." Civil Rights Issues of Handicapped Americans: Public Policy Implications (May 13-14, 1980, Washington, D.C., pg. 337).

A. The District Court Erred in Concluding That the UMTA and FAHA Did Not Require That New Buses Purchased Primarily With Federal Funds Be Accessible to and Usable by Mobility Handicapped Persons.

Congress amended UMTA in 1970 to provide handicapped persons with an equal right to use mass transportation and required that transit systems be planned, designed, constructed, and operated to permit their effective use by these persons. See 116 Cong. Rec. 34180 (Sept. 29, 1970). Representative Biaggi, who authored the amendment, rejected without opposition the notion that his amendment would permit paratransit in place of accessible systems (*id.* at 34181):

> "Other proposals have been offered that would set up special transportation facilities for the elderly and the handicapped. Others would provide subsidies so that these people could use more expensive services such as taxi cabs or limousines.

> However, besides the factor of cost for these programs, they would further serve to segregrate the elderly and the handicapped from our society."

In 1973, Congress established a corresponding accessibility requirement under FAHA. See S. Rep. No. 93-61, 93 Cong., 1st Sess. 15, 35 (1973); see also S. Rep. No. 93-355, 93 Cong., 1st Sess. 87 (1973) (Conference Report).

Reacting to reluctance by the Department of Transportation to provide access for wheelchair-bound individuals, Congress moved in 1974 to reaffirm and strengthen the accessibility requirements of FAHA, expressly indicating that "non-ambulatory wheelchair-bound [individuals] and those with semi-ambulatory capabilities" were included within the coverage of that statute. See Section 105 of Pub. L. 93-643; see also S. Rep. No. 93-1111, 93rd Cong., 2d Sess. 7-8 (1974); 120 Cong. Rec. 30820 (Sept. 11, 1974) (remarks of Sen. Stafford); *id.* at 30823 (remarks of Sen. Randolph). Although no corresponding clarification was made that year to UMTA, Congress nevertheless prohibited the use of Department of Transportation funds for purchasing rolling stock, including buses, or for constructing transit facilities unless they were ". . . designed to meet the mass transportation needs of the elderly and the handicapped." Section 315 of the Department of Transportation and Related Agencies Appropriation Act of 1975, Pub. L. 93-391. Representative Biaggi, who authored this provision, stated that it would reaffirm the intent of his 1970 UMTA amendment to make newly designed or constructed transit facilities and services fully accessible to handicapped persons. 120 Cong. Rec. 19851 (June 19, 1974); *ibid.* (remarks of Rep. McFall). Representative Biaggi indicated that his provision was addressed to the "out and out discrimination" of the Depart-

ment of Transportation in fostering separate services and impeding accessible transportation (*ibid.*):

> "My amendment, today, will put a stop to future expenditures by the Department of Transportation for equipment and facilities that are inaccessible to the elderly and the handicapped. We cannot continue to abide by the doctrine of separate and unequal facilities."

Subsequently, Representative Biaggi stated:

> "In 1970 I introduced an amendment to the Urban Mass Transportation Act that established for the first time national policy that the elderly and the handicapped are entitled to equal access to public mass transit facilities. *Unfortunately, the Department of Transportation has taken a leaf from past history and interpreted that to mean 'separate but equal' systems.* As we have learned from the education system, 'separate but equal' does not mean that at all. The handicapped still must rely on private transportation or cabs to get around. The Dial-a-Ride programs and other specialized transportation systems for the handicapped are too expensive to maintain and are very limited in availability. . . . *The handicapped-including the wheelchair-bound — are to have full and complete access to mass transit systems.*" (120 Cong.Rec. 28414) [Emphasis added]

B. The District Court Erred in Concluding That Section 504 Did Not Impose *Any* Obligation on the Transit District Not to Discriminate Against Mobility Handicapped Persons by Providing Them With Segregated Transportation When It Was Feasible to Provide Them With Integrated Transportation.

The Transit District concededly is a recipient of federal financial assistance. Indeed, the federal government pays for 80% of the cost of each bus purchased by the District.

The district court held that Section 504 had *no* bearing on the case because the transit authority received its funds from the Department of Transportation (DOT) and that agency had not yet issued a Section 504 regulation at the time the buses were ordered. The court recognized that the Department of Health, Education and Welfare (HEW) had issued Section 504 regulations prior to September 19, 1977, but concluded that those regulations were irrelevant because the transit authority received no funds from HEW. The district court was of the opinion that the Congressional mandate contained in Section 504 had no independent force of its own. The district judge's conclusion is at odds with the conclusion of another judge in the same district. See, *Paralyzed Veterans of America v. Smith, et al.*, United States District Court, Central District of California No. 79-1979 WPG. In that case, Judge William P. Gray ordered federal agencies which had not yet filed Section 504 regulations to publish in the Federal Register a notice advising recipients of federal financial assistance that they had obligations under Section 504, and that they should look to the HEW regulation for guidance as to their obligations.[4]

The HEW Section 504 regulation makes it plain that needless segregation of handicapped persons is discriminatory and violates Section 504. The introductory portion of the HEW regulation states that Section 504 "establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life." (42 Fed.Reg. 22676). The regulation catalogues a number of illegal discriminatory actions. (45 C.F.R. 84.4). A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on

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[4]Attached hereto as Appendix H, 28a-30a, are the Findings of Fact and Conclusions of Law signed by Judge William P. Gray.

the basis of handicap, afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded others; provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others; provide different or separate aid, benefits or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others; or otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving aid, benefit or service. 45 C.F.R. 84.4(b)(3) states that despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are *not separate or different*.

The HEW regulation characterizes "accessibility" as "the central requirement of the regulation." 45 C.F.R. 84.22 provides that a recipient shall operate each program or activity receiving federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. 45 C.F.R. 84.22(b) provides that a recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with 45 C.F.R. 84.22(a). However, subsection (b) states that in choosing among available methods for meeting the requirement of subsection (a) "a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate."

Petitioner recognizes, of course, that there is disagreement as to how much § 504 requires, of a recipient of federal

financial assistance. Plainly, however, § 504 requires *something* of transit authorities receiving 80% of their funds from the federal government. *Baker v. Bell*, 630 F.2d 104 (5th Cir. 1980); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *Bartels v. Biernat*, 427 F.Supp. 226 (E.D. Wis. 1977); *Michigan Paralyzed Veterans of America v. Coleman*, 451 F.Supp. 7 (E.D. Mich (1977)).

The most recent cases on the subject have added confusion to the state of the law. *Dopico v. Goldschmidt*, 80 Civ. 4561 (S.D. N.Y. July 24, 1981); *APTA v. Goldschmidt*, 485 F.Supp. 811 (D.D.C. 1980) *reversed* and remanded *APTA v. Lewis*, 80-1497 (D.C. Cir., May 26, 1981). In *APTA v. Goldschmidt, supra*, the district court upheld DOT's regulation, providing for integrated transportation for handicapped persons, issued under the authority of UMTA, FAHA, and Section 504. The court, citing *Brown v. Board of Education*, 347 U.S. 483, overruling *Plessy v. Ferguson*, 163 U.S. 537, noted that the human value of providing integrated transit services to handicapped Americans must weigh heavily in the scale. (485 F.Supp. at 830).

The Court of Appeals reversed and remanded. The majority held that if the regulation was based solely on Section 504, it would be invalid. The court recognized, however, that the regulation might be supported by UMTA and FAHA and remanded the case to the Secretary of Transportation for his decision as to whether the regulation was supported by those statutes. Judge Edwards concurring, indicated that in a proper case he might find that Section 504 did support the regulation. He stated that "the application of Section 504 to public transporation systems raises some questions that are significantly different from those considered by the . . . Court in the higher education setting in *Southeastern*

Community College v. Davis, 442 U.S. 397." He stated that in considering the accessibility of public transportation to otherwise qualified handicapped persons, "it is much more difficult to avoid 'discrimination' without taking some kind of 'affirmative action'." Judge Edwards nevertheless voted with the majority to reverse and remand the case to the Secretary of Transportation for reconsideration of the regulation in light of the court's opinion, because the administration record did not set forth unequivocally the statutory authority and the factual basis for the action taken.

Senator Cranston, speaking to the Senate on August 1, 1981, stated that it was very clear to him that the present administration is using *APTA v. Lewis* "to overturn all of the progress we have made in this area over the last four years." (127 Cong. Rec. August 1, 1981 S9030-9031). Senator Cranston was referring to the fact that on July 20, 1981 the Secretary of Transportation radically revised the regulation to permit segregated, rather than integrated, transportation. No effort was made to comply with the remand by the Court of Appeals to examine the regulation and determine whether it should remain in effect to implement UMTA and FAHA. Commenting on the Secretary's action, Senator Cranston stated: "These new regulations [of July 20, 1981] are made in explicit disregard of the provisions of federal law — including Section 504 of the Rehabilitation Act — that they purport to implement and which were designed to guarantee the availability of federally subsidized programs, including mass transit facilities, to elderly and handicapped Americans." (*Ibid.*)

If, as Senator Cranston suggests, the Congressional mandate for integrated, rather than segregated, transportation for mobility handicapped Americans is being undermined, a decision by this Court is necessary to set the matter right.

C. The District Court Erred in Concluding That the Regulation Issued by the Department of Transportation on April 30, 1976 — Which Authorized Segregated Transportation for Mobility Handicapped Persons — Was Not in Conflict With UMTA, FAHA, and Section 504, and in Summarily Concluding, Without Evidentiary Hearing or Adequate Record, That Respondents Were in Full Compliance With the Said Regulation and the Applicable Statutes.

1. Despite the passage of laws in 1970 and 1973, to provide accessible mass transportation for handicapped persons, the Department of Transportation did not issue any regulation to implement these statutes until April 30, 1976 (41 Fed.Reg. 18234). The regulation purported to authorize transit districts to provide handicapped individuals with segregated transportation, so long as "special efforts" were made to provide them with some transportation. The 1976 regulations stated:

> "As used in this guidance, the term 'special efforts' refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semi-ambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, 'special efforts' in planning means *genuine good faith progress* in planning services *for wheelchair users and semi-ambulatory handicapped persons* that is *reasonable by comparison* with the service provided to the general public and that *meets a significant fraction of the actual transportation needs* of such persons *within a reasonable time period.*" (41 Fed.Reg. 18236) [Emphasis added]

The gloss thus placed on the regulation indicates the marked deviation from statutes enacted by Congress. In the

first place, the regulation authorized isolation of the mobility handicapped. With regard to these individuals, "genuine, good-faith" progress in planning service that would be "reasonable by comparison" to the service all others were receiving in the public mass transportation program would be enough. A significant fraction of the needs would do, and all of this within a "reasonable time period." Thus, contrary to law, contrary to Congressional policy, and contrary to HEW § 504 regulations, these federal agencies enunciated a "separate but equal" service to continue for a time period measured by the term "reasonable." The requirement to mainstream the handicapped into society, to provide them with the most appropriate "integrated setting" was, it is submitted, deliberately flouted.

Under the regulation, a transit district was free to adopt as an "alternative" a "substitute service that could provide comparable coverage and service levels." Under the 1976 regulation, segregated transportation was authorized as a permanent fixture in the rapid transit districts' transportation system. It is petitioner's submission that the 1976 regulation is in plain and open warfare with UMTA, FAHA, and § 504.

2. In the case at bar, the district court improperly concluded by way of summary judgment that respondents had complied with the 1976 regulation and the applicable statutes. In their motions for summary judgment the respondents insisted that the segregated transportation offered mobility handicapped persons, while admittedly separate, was "equal" to that afforded non-handicapped persons. Respondents asserted that the segregated service provided "comparable" coverage and service levels, and that "special efforts" were made to achieve "genuine, good faith progress" which was "reasonable by comparison" with the service rendered to the general public. Petitioner, in opposition to the motion for summary judgment, filed a Statement of Genuine Issues

supported by two declarations. Genuine issues were raised with respect to the following: (1) whether the segregated, Dial-a-Lift system was substantially "equal" to the transportation service provided non-handicapped persons; (2) whether it was "comparable" or as "effective"; (3) whether the system met a significant fraction of the needs of the handicapped community within a reasonable time; and (4) whether it provided transportation in the most integrated setting appropriate.

If there is a common factor among all this language, it is that none of these expressions readily lend themselves to *ad hoc* rulings. What is "reasonable" is usually a question of fact at trial for judge or jury. Whether sound judgment has been used, whether actions have been well balanced, sensible, within the bounds of right judgment and thinking, are all factors bearing on the issue of "reasonableness." Whether something is reasonable "by comparison" means that different items will be juxtaposed to ascertain their similarities and dissimilarities. The very word "comparable" implies issues of matching, contrasting. "Special efforts" connotes some uncommon, noteworthy, extraordinary exertion to achieve a particular purpose. These are not matters which can ordinarily be decided by untested self-serving declarations. Nor does the word "equal" always turn out to be the same, as the desegregation cases of this Court amply establish. In granting summary judgment and dismissing the action, the Court below ignored the governing standards enunciated by this Court. See, *Adickes v. Kress & Co.*, 398 U.S. 144; *United States v. Diebold*, 369 U.S. 654; *Poller v. Columbia Broadcasting System, Inc.*,

368 U.S. 464, 467, 472-73; *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627-29; *Axenas v. United States*, 322 U.S. 408, 431-32, 434.

D. The District Court Erred in Denying Petitioner's Motion to Amend the Complaint to Include State Pendent Claims Under the Standards and Criteria Enunciated in United Mine Workers of America v. Gibbs, 383 U.S. 715.

Petitioner sought unsuccessfully to file an amended complaint under § 4500 of the California Government Code. That section expressly requires that every transit district must purchase accessible buses, if there are two manufacturers making such buses. Under *United Mine Workers of America v. Gibbs, supra*, the district court should have permitted petitioner to pursue her state claim. In *Gibbs*, the Court held that where state and federal claims "derive from a nucleus of operative facts" and the federal issues are substantial, the federal court has power to hear the whole case. Where the state claims are "closely tied to questions of federal policy," the exercise of pendent jurisdiction "is particularly strong." (383 U.S. at 727).

Conclusion.

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Yvonne Bagstad, on behalf of herself and all other persons similarly situated, Plaintiff-Appellant, v. Orange County Transit District; James Reichert; Robin Young; Phillip Anthony; Al Hollinden; William Farris; Ralph B. Clark; Andrew L. Lewis,* Secretary, Department of Transportation, Robert H. McManus,* Administrator, Urban Mass Transportation Administration; Ray Barnhart,* Administrator, Federal Highway Administration, Defendants-Appellees. No. 79-3426. DC No. CV 78-4734 IH.

Filed: May 6, 1981.

Appeal from the United States District Court for the Central District of California. Irving Hill, Chief District Judge, Presiding. Argued and Submitted April 6, 1981.

Before: CHOY and ALARCON, Circuit Judges, and BURNS,** District Judge.

CHOY, Circuit Judge:

Appellant Yvonne Bagstad appeals from a summary judgment in favor of the appellees. Bagstad filed this purported class action[1] on December 13, 1978 seeking declaratory and injunctive relief to bar the Orange County Transit District (OCTD) from purchasing 65 transit buses which are not accessible to persons in wheelchairs. Bagstad's complaint

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*The named federal officials have been substituted for Brock Adams, former Secretary, Department of Transportation, Richard S. Page, former Administrator, Urban Mass Transportation Administration, and William M. Cox, former Federal Highway Administration Administrator, pursuant to Fed. R. App. P. 43(c).

**The Honorable James W. Burns, Chief United States District Judge for the District of Oregon, sitting by designation.

[1]Bagstad filed her complaint as a class action but summary judgment was granted before the class certification.

alleged that the local appellees, by applying for and accepting federal funds, and the federal appellees, by approving the grants of funds to OCTD, violated various federal statutory and constitutional provisions because the public transportation system was allegedly operated in a manner which excluded handicapped persons.

The district court granted the appellees' motions for summary judgment on the alternative grounds of laches and compliance with applicable law and regulations.

We find that the district court was correct in holding that Bagstad's claims were barred by the doctrine of laches. The doctrine bars an action for equitable relief where there has been an unreasonable or unexcusable delay that has resulted in prejudice to the opposing party. *See Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979). The uncontroverted facts show that a significant period of time passed between the announcement of the intention to purchase the nonaccessible buses (February 7, 1977) and the filing of this action (December 13, 1978). Although Bagstad said she was not aware of the contract award until after September 19, 1977, she does not deny knowledge of the public controversy surrounding the award during the preceding months. The complaint was not filed until the project was near completion. Had Bagstad brought her claim earlier, OCTD might have ordered accessible buses originally; to retrofit the buses with wheelchair lifts at this time will clearly be more costly and significantly disrupt the operations of the transit system.

The Supreme Court has held that whether laches bars an action in a given case depends upon the circumstance of that case and is "a question primarily addressed to the discretion of the trial court." *Gardner v. Panama Railroad*

Co., 342 U.S. 29, 30 (1951). The facts upon which the laches decision was based are uncontroverted.

Under the circumstances of this case the district judge's finding that laches barred the action was within his discretion. There being no genuine issue of material fact, summary judgment was appropriate. Fed. R. Civ. P. 52(c); *See Boone v. Mechanical Specialties Co.*, 609 F.2d 956.

AFFIRMED.

APPENDIX B.

Summary Judgment.

United States District Court, Central District of California.

Yvonne Bagstad, Plaintiff, v. Orange County Transit District, et al., Defendants. No. CV 78-4734-IH.

Filed: June 13, 1979.

There came before the Court on June 11, 1979, for argument a motion for summary judgment filed March 23, 1979, on behalf of the so-called Federal Defendants, Brock Adams, Secretary, Department of Transportation, Richard S. Page, Administrator, Urban Mass Transportation Administration, and William M. Cox, Administrator, Federal Highway Administration; and a motion for summary judgment filed on March 23, 1979, by so-called Local Defendants, Orange County Transit District, James Reichert, Robin Young, Philip Anthony, Al Hollinden, William Farris and Ralph B. Clark. Appearances were: for Plaintiff, Stanley Fleishman, Esq., and Fred Okrand, Esq. (Mr. Fleishman argued). For Federal Defendants, David C. Shilton, Attorney-Advisor, Urban Mass Transportation Administration, and Eva Halbreich, Assistant United States Attorney (Mr. Shilton argued). For Local Defendants, Rourke & Woodruff by Kennard R. Smart, Jr. (Mr. Smart argued). The Court having considered the said motions and the various evidentiary documents, Points and Authorities and other documents filed in support thereof and in opposition thereto, and having heard argument, announced in open Court that each said motion was granted as to each Defendant. The Court further announced and ORDERED that a transcript of the entire proceedings should be obtained and filed by Defendants which, when filed, would constitute the Court's Findings of Fact and Conclusions of Law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants Brock Adams, Secretary, Department of Transportation, Richard S. Page, Administrator, Urban Mass Transportation Administration, William M. Cox, Administrator, Federal Highway Administration, Orange County Transit District, James Reichert, Robin Young, Philip Anthony, Al Hollinden, William Farris and Ralph B. Clark, and each of them, shall have judgment against Plaintiff. Plaintiff shall take nothing against any said Defendant. Each side will bear its own costs.

2. The Clerk shall transmit a copy of this Judgment by United States mail to counsel for both sides.

DATED: June 13, 1979.

/s/ Irving Hill
IRVING HILL, Judge
United States District Court

APPENDIX C.

Reporter's Transcript of Proceedings.

Los Angeles, California, June 11, 1979. (Oral Findings of Fact and Conclusions of Law Granting Summary Judgment).

United States District Court, Central District of California.

Honorable Irving Hill, Judge Presiding.

Yvonne Bagstad, on behalf of herself and all other persons similarly situated, Plaintiffs, vs. Orange County Transit District; James Reichert; Robin Young; Philip Anthony; Al Hollinden; William Farris; Ralph B. Clark; Brock Adams, Secretary, Department of Transportation; Richard S. Page, Administrator, Urban Mass Transportation Administration; William A. Cox, Administrator, Federal Highway Administration, Defendants. No. CV 78-4734 IH.

THE COURT: Why don't you all have seats and let me summarize what is here, and give you some of my tentative views about it.

What is before the Court today, counsel, is a separate motion by each side, or by each group of defendants, rather, for summary judgment, the local and the federal. Both motions were filed March 23rd.

Apparently just this morning counsel for plaintiff sought to file a supplemental brief in which he is calling attention of the Court to the long-awaited new regulations by the Department of Transportation, and making some argument based on those regulations.

The federal defendants had already made those available to us, and I am allowing the supplemental motion to be filed and have considered it.

Here is the original, Mr. Clark, to be filed.

The evidence submitted by each side on this summary judgment motion includes evidence that that side submitted in connection with the preliminary injunction hearing and I will consider all such preliminary injunction evidentiary material as offered in addition to the summary judgment materials for the purposes of the summary judgment motion.

The evidence is so voluminous that I am not going to take time to try to list it all. I have seen it all. It's all in the file.

My tentative view is to grant each motion, and I would grant them on a number of alternative grounds.

Before I enumerate those alternative grounds, I would like to take note now of those new regulations issued by the Department of Transportation, I believe it was May 31st. These are the final regulations on assistance for handicapped in federally-assisted transportation. These regulations were much talked about generally and in this lawsuit, and they were issued well in advance of the October deadline.

These new regulations supersede the 1976 regulations of the Department of Transportation, at least from May 31st on. And those 1976 regulations have also been much discussed in this case.

Among the provisions of the May 31st, the new regulations, is a requirement that new buses solicited after July 2, 1979, must be equipped with devices for wheelchairs. So that is less than a month away. And after July 2nd of 1979, the relief which plaintiff is seeking, some of the relief, to the extent that plaintiff seeks that all new buses solicited and bought by the Orange County District hereafter be equipped with wheelchair devices is mandated by the regulations. And the case would therefore appear to me to be mooted by the new regulations at least as it involves prospective relief.

Now, although the plaintiff's complaint does appear to seek prospective relief, it mainly focuses on the sixty-five buses which the Orange County District contracted for in September 1977; contracted for with no wheelchair accessibility device on them.

My memory is, and I believe the papers in the case show, that those sixty-five are now delivered, going through testing; and the last word I had was that they had not yet gone into operation.

I wonder, Mr. Smart, if that is still the situation.

MR. SMART: Some of the buses, your Honor, are now —

THE COURT: They are now in operation.

MR. SMART: That is correct.

THE COURT: Okay. Plaintiff's complaint sought that the contracts for those sixty-five buses which were contracted for in September 1977 be amended to require installation on them of the wheelchair accessibility device; or in the alternative, an order of the Court issue for retrofitting those buses. It also sought, as I have said, a declaration that further buses acquired by the District must have wheelchair accessibility devices.

In addition to the sixty-five, the District has solicited and ordered no other buses except one new group of seventy-five, which the information furnished to me indicates where ordered and contracted for with the devices on them.

Is that still the situation, Mr. Smart?

MR. SMART: That is correct, your Honor.

THE COURT: Have the contracts been signed? Or do you know about that?

MR. SMART: I believe they have not been signed. They are waiting UMTA approval because —

THE COURT: They are waiting whose approval?

MR. SMART: UMTA. Because it is the sole —

THE COURT: I am sorry. I didn't hear.

MR. SMART: Urban Mass Transportation Administration.

THE COURT: That is an acronym which is not familiar to me. Say it again.

MR. SMART: UMTA, U-M-T-A.

THE COURT: It sounds like "umpta-dumpta." But okay.

That approval, what about it?

MR. SMART: It's a sole-source purchase because only one bidder, General Motors, submitted a bid. So it takes closer scrutiny and review of the Administration prior to approval. We anticipate that within the following two weeks.

THE COURT: All right. The seventy-five, however, are ordered with the devices on. And as to future orders of buses, leaving the sixty-five aside from 1977, the case would thus seem entirely moot. It would seem to me that plaintiff has shown no right to any prospective equitable relief for the reasons stated. And it seems to me also, at least tentatively, that no bona fide dispute of material fact exists as to prospective relief.

Now, if that holding as to prospective relief is made, it would leave us with the complaint as it applies to the sixty-five buses which have been contracted for and procured, some of them in operation, contracted for in September 1977. And on that aspect of the case, my tentative holding would be that summary judgment should be granted on several different alternative grounds. They would be as follows:

Ground one. Laches. On the laches issue no new evidence has come in, I believe, since the preliminary injunction hearing. And I would propose to find that there is no bona fide dispute of material fact as to the existence of laches concerning the sixty-five buses ordered in 1977; and that laches has been demonstrated as to them by defendants as a matter of law.

I would propose to find that the defendant has shown laches as to those buses both as to the named plaintiff and the alleged class. And I would reincorporate remarks and findings that I made on that subject at the preliminary injunction hearing. And the conclusion would be that the defendant has shown entitlement to judgment as to both the named plaintiff and the members of the class as a matter of law.

The second alternative ground would be this: Under existing law and regulations, the defendants have complied with all requirements and have demonstrated that they have no obligation to retrofit the sixty-five buses. This is because they have satisfied the requirements of the Department of Transportation's 1976 regulations. Those regulations are the only ones which apply to the sixty-five buses. The new regulations are not retroactive in application.

I don't agree with the plaintiff that the '76 regulations were promulgated pursuant to the Urban Mass Transportation Act only. Plaintiff so contends and contends that they were not promulgated pursuant to Section 504 of the Rehabilitation Act. And as I say, I don't agree. They were promulgated pursuant to both statutes.

The 1976 regulations say that if a district shows that it has made what the statute and regulations call "special efforts" on behalf of handicapped people, it need not go further. Special efforts, under the regulations, are shown

to exist if (A) the district has demonstrated sufficient planning of programs to improve the transport for the handicapped. (B) that the plans have been implemented. And (C) reasonable progress in implementation.

Now, as to (A), sufficient planning of programs, such planning is clearly shown in the evidence. Plaintiff doesn't seem to dispute it. And I would propose to find no dispute of material fact on that aspect.

As to (B), that the plans be implemented, the evidence is that the district has spent at least 5 percent of its contribution to mass transit for a handicapped program. That is Orange County's showing in the evidence.

The present rate of expenditure in 1976 exceeds 7.3 percent. And the average for the last three years is 5.5 percent. These facts are not disputed, and the level of the expenditures would appear to meet the test; and I would propose so to find.

As to (C), the showing of reasonable progress in implementation. On this matter there are very few cases indeed which even talk about what those words mean. Obviously a district cannot spend the requisite sum of money for such things as a dial-a-lift program and implement it by acquiring the buses, and then not serve anybody and leave all the buses in the garage. You can't do that. That would be no progress in implementation. And a district could not spend the money and create a substitute service which is a sham and a farce. That is really saying about the same thing. But that would be no reasonable progress in implementation.

The substitute service to constitute reasonable progress in implementation must be bona fide. If there is a bona fide substitute service existing of reasonable scope this, it seems to me, constitutes a substitute program and implementation as provided in the regulations, even if that substitute service

is not perfect and even if it doesn't give immediate response for every trip that every wheelchair-bound person would like to make.

I would propose to find that there is no bona fide dispute of material on all three aspects of this District meeting the special efforts requirement. The dial-a-lift program would be found to constitute the requirement for reasonable progress in implementation.

The defendants' uncontradicted evidence shows that there are twenty buses in operation as of January '79, with I believe it's 3500 individual rides given in that month. And all there is in the evidence to the contrary is a declaration from Mr. Cannon, a wheelchair-bound person, that he tried to get an immediate ride from the airport to the Disneyland Hotel one day and was told he couldn't be accommodated that day.

His declaration also says that the same afternoon he was told the same thing. And he then went on to discuss a proposed trip to San Clemente — he doesn't tell us from where — and was told that it could not be scheduled on short notice and they would need several days' notice.

Giving this contrary evidence all reasonable intendments, it does not in my mind create a conflict of material fact, a bona fide dispute of material fact, as to the existence of reasonable progress and implementation in the face of the uncontradicted other evidence from the District that I have mentioned.

I know there are some letters attached to a declaration from Mr. Fleishman, but they are not probative evidence. They are hearsay.

In my view, also, the policy statement contained in the new regulations which plaintiff's counsel mentioned in that brief, the supplemental brief — the policy statement about

maximum integration possible. That policy statement does not affect the case or the proposed judgment. Those regulations are not retroactive and they don't constitute any legal requirement. It is a policy statement.

Now, I have read the very long statement of alleged genuine issues that were submitted by the plaintiff. And I regard practically all of them as legal issues; and it follows from what I have said that I don't agree with plaintiff's position on the law as stated therein.

THE COURT: The motion for summary judgment is granted. The tentative decision of the Court and the tentative findings and conclusions expressed from the bench this morning are adopted as the Court's final judgment and final findings and conclusions.

I am asking defendants to order a transcript. Will you do that right away, please, Mr. Smart.

MR. SMART: Yes, your Honor.

APPENDIX D.

Order.

United States Court of Appeals for the Ninth Circuit.

Yvonne Bagstad, on behalf of herself and all other persons similarly situated, Plaintiff-Appellant, v. Orange County Transit District; James Reichert; Robin Young; Phillip Anthony; Al Hollinden; William Farris; Ralph B. Clark; Andrew L. Lewis,* Secretary, Department of Transportation, Robert H. McManus,* Administrator, Urban Mass Transportation Administration; Ray Barnhart,* Administrator, Federal Highway Administration, Defendants-Appellees. No. 79-3426. DC No. CV 78-4734 IH.

Filed: June 26, 1981.

Before: CHOY and ALARCON, Circuit Judges, and BURNS,** District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The named federal officials have been substituted for Brock Adams, former Secretary, Department of Transportation, Richard S. Page, former Administrator, Urban Mass Transportation Administration, and William M. Cox, former Federal Highway Administration Administrator, pursuant to Fed. R. App. P. 43(c).

**The Honorable James W. Burns, Chief United States District Judge for the District of Oregon, sitting by designation.

APPENDIX E.

Relevant Statutes.

1. Section 16 of UMTA, 49 USC §1612 (1976) states in its entirety:

"(a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this Act) should contain provisions implementing this policy.

(b) In addition to the grants and loans otherwise provided for under this Act, the Secretary is authorized to make grants and loans —

(1) to States and local public bodies and agencies thereof for the specific purpose of assisting them in providing mass transportation services which are planned, designed, and carried out so as to meet the special needs of elderly and handicapped persons, with such grants and loans being subject to all of the terms, conditions, requirements, and provisions applicable to grants and loans made under section 3(a) and being considered for the purposes of all other laws to have been made under such section; and

(2) to private nonprofit corporations and associations for the specific purpose of assisting them in providing transportation services meeting the special needs of elderly and handicapped persons for whom mass transportation services planned, designed and carried out under paragraph (1) are unavailable, in-

sufficient, or inappropriate, with such grants and loans being subject to such terms, conditions, requirements, and provisions (similar insofar as may be appropriate to those applicable to grants and loans under paragraph (1)), as the Secretary may determine to be necessary or appropriate for purposes of this paragraph.

Of the total amount authorized to be appropriated pursuant to section 4(c)(3) of this Act, 2 per centum may be set aside and used exclusively to finance the programs and activities authorized by this subsection (including administrative costs)."

2. Section 165(b) of the Federal Aid Highway Act (FAHA) 23 USC § 142 note states in its entirety:

"(b) The Secretary of Transportation shall require that projects receiving Federal financial assistance under (1) subsection (a) or (c) of section 142 of title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) section 147 of the Federal Aid Highway Act of 1973 shall be planned, designed, constructed, and operated to allow effective utilization by elderly or handicapped persons who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory wheelchair-bound and those with semiambulatory capabilities, are unable without special facilities or special planning or design to utilize such facilities and services effectively. The Secretary shall not approve any program or project to which this section applies which does not comply with the provisions of this subsection requiring access to public mass transportation facilities, equipment, and services for elderly or handicapped persons."

3. Section 504 of the Rehabilitation Act, 29 U.S.C., §794 (Supp. III 1979), states in its entirety:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

APPENDIX F.

Reporter's Transcript of Proceedings.

Los Angeles, California, Monday, February 26, 1979. (Oral Findings of Fact and Conclusions of Law Denying Petitioner's Motion for Preliminary Injunction).

In the United States District Court, Central District of California.

Honorable Irving Hill, Judge Presiding.

Yvonne Bagstad, on behalf of herself and all other persons similarly situated, Plaintiffs, vs. Orange County Transit District; James Reichert; Robin Young; Philip Anthony; Al Hollinden; William Farris; Ralph B. Clark; Brock Adams, Secretary, Department of Transportation; Richard S. Page, Administrator, Urban Mass Transportation Administration; William A. Cox, Administrator, Federal Highway Administration, Defendants. Civil Action No. CV 78-4734-IH.

THE COURT:

Well, I will go right now to the tentative rulings. My tentative decision is to deny the requested preliminary injunction and I do so on three alternative grounds as follows:

1. Laches.

2. Lack of probable success on the merits.

3. That on balancing the equities, the equities against issuing the injunction greatly preponderate.

THE COURT: Very well. I want to now proceed to discuss the three grounds, and first is laches.

This is a class action with one named plaintiff, and whether laches is viewed in terms of the one named plaintiff or in terms of the class as a whole is a question that neither nor none of you have briefed.

My tentative view is that laches barring the preliminary injunction is shown to exist on the facts now before me.

And I don't propose to lay out all of the facts that appear to support the laches claim, but I will discuss some of them. And those facts also apply to and should be considered as being stated under the heading of balancing the equities. And I will deem this discussion of the facts to be incorporated under that heading, as well.

Here are some of the facts that seem to me to be relevant and important:

In November 1975 public notice was given throughout the county, including the plaintiff's own community of Costa Mesa, of a hearing in December 1975. The notice said that there would be a hearing on the acquisition of these buses with the federal money, and specified other facilities which the District would acquire and use in addition to the buses with the federal moneys.

There is just no question but that the suitability of the design of the proposed new buses and whether or not they would incorporate wheelchair accessibility features was a public issue in the community from that time on.

The public notice specified that a portion of the federal funds would be used to implement the Dial-a-Ride program. I don't think it mentioned specifically the Dial-a-Lift program. Is that not correct?

MR. SMART: That is correct, your Honor.

THE COURT: Now, is the Dial-a-Ride program an alternative service for the mobility handicapped or not? I understood you to exclude the mobility handicapped from Dial-a-Ride. Am I right about that?

MR. SMART: Well, those buses are not accessible to persons confined to wheelchairs, Dial-a-Ride.

THE COURT: All right. Now, the very objection asserted by this plaintiff and the legal position that she asserts, namely, the claim that the new buses must be fitted with

wheelchair accessibility devices, were all debated in the public hearings in December 1975 and thereafter.

In June 1976, the federal grant was approved by the federal authorities, and included in the publicity of that approval was the information that no wheelchair accessibility features would be in the new buses, although the buses would be equipped in the interior with a lot of passenger amenities to aid handicapped riders.

Then in October 1976 the Dial-a-Lift program was promulgated with three buses. It was later expanded in August of 1977 and again in January 1979. It now has twenty buses, with eight more on order, affording portal-to-portal service for what I believe is fifty cents a ride.

Am I right about that? Is that the cost?

MR. SMART: I believe, your Honor, it's thirty-five cents a ride.

THE COURT: Thirty-five? Somewhere in the papers —

MR. SMART: No more than seventy cents. But I believe it's thirty-five cents.

THE COURT: There is a figure of fifty cents in these papers some place.

Anyhow, this part of the discussion, particularly the extent and adequacy of Dial-a-Lift, is also germane to the later discussion about "irreparable harm," and I incorporate it there also.

It would be my finding that the plaintiff would suffer no irreparable injury from the delivery of these buses without the features she insists be on them because of the availability of the reasonably-priced alternative service. That facet also affects lack of probable success on the merits.

I turn to a matter of law. I would tentatively construe the federal law as not prohibiting acquisition at this time of new

buses by the District like these that they have ordered without the wheelchair devices inasmuch as a comparable service is being provided. I propose to find the present Dial-a-Lift service as comparable service within the meaning of those statutes.

Let me take up the chronology under the general heading of laches. After October 1976 when the Dial-a-Lift program was promulgated, the next event appears to be public meetings of supervisors in February of 1977 and in April of 1977, attended by representatives of the handicapped and in which they made urgent presentation of the asserted right to have the buses equipped with the accessibility devices. Those claims were debated at those meetings.

Incidentally, I have looked at plaintiff's declaration carefully. She does not deny knowledge of all or any of the public debate and discussion and the notices which I have mentioned up to this point.

In September 1977, the supervisors at a public meeting awarded the bid for these buses without the devices and the contract was thereafter entered. Plaintiff in her declaration admits knowing about that right after it happened.

She also clearly knew about the commencement of the Superior Court case in May of 1978.

Starting in September and through December 1977, the evidence indicates that the plaintiff began calling county supervisors and actively and personally intervened in the issue being debated in Orange County, personally protesting the kind of buses that they were buying.

Well, those are all the facts I want to list right now. The record seems to me to amply support a finding of laches, at least that is my tentative conclusion. She attempts to explain her inaction only by claiming reliance on the California Attorney General and the state case. And in my view

that is not a sufficient explanation and does not excuse the failure to assert these federal remedies earlier which she now asserts. She was present in state court when the preliminary injunction was denied there and waited five months thereafter before commencing this action. That is itself, and without reference to all the other facts, independent and sufficient proof of laches. But, of course, there are other facts, as well.

(Other court matters.)

THE COURT: I would like to continue the exposition of my tentative rulings in the case before calling on counsel. I move to the subject of lack of probable success on the merits, alternative No. 2.

I have already told you that in my view the federal statutes and regulations do not require the buses, new buses delivered now to have the devices on them so long as comparable services are provided. And I have indicated my tentative finding about the Dial-a-Lift services as being comparable. And in my view, under such a construction of the law, the plaintiff's case as now demonstrated in the evidence before me does not show a likelihood of probable success. And to the contrary, there is lack of probable success on the merits indicated.

I note that plaintiff's counsel argues that separate but equal facilities do not satisfy the federal statutory and regulatory requirements. But I think plaintiff is just wrong about that. HEW regulations themselves, Section 85.58, say that the Department of Transportation can determine not to require the devices on new buses at this time and up to October 1979. And the Department has so determined by authorizing and approving the grants involved in this case.

I now proceed to the third alternative ground, balancing the equities.

As I have indicated, I would find, tentatively, that no irreparable injury to plaintiff or to the class has been shown because of the existence of the alternative system.

Also, if plaintiff wins the action on the merits, the buses can thereafter be modified to contain the devices. That is further evidence of no irreparable injury resulting from the denial of injunction.

Second under this heading I would find, at least tentatively, that the harm to defendants from granting the injunction would be very great — far greater than any benefit to the plaintiff or class members from granting the injunction.

If an injunction is granted, I would think that a very substantial bond would be required to cover potential breach of contract and other losses on the part of the defendants.

Thirdly under this heading, the public interest, it seems to me tentatively, militates against the preliminary injunction. Public interest, of course, is a multi-faceted concept. On balance, I would tentatively find that the public interest is served by taking delivery of the buses as per the contract and by having the buses on the road serving the non-handicapped public.

There is also of course a public interest in making it as easy as possible for the wheelchair handicapped to use mass transportation. But on the facts of the case as exposed and as exist under the evidence before me, that public interest, namely, the interest with respect to the wheelchair handicapped, would be a subservient public interest and of greatly lesser importance than the countervailing public interest.

Now, those are my views. I apologize for taking so long in stating them.

APPENDIX G.

Affidavit of Yvonne Bagstad in Support of Motion for Preliminary Injunction.

United States District Court, Central District of California.

Yvonne Bagstad, on behalf of herself and all other persons similarly situated, Plaintiffs, vs. Orange County Transit District; James Reichert; Robin Young; Phillip Anthony; Al Hollinden; William Farris; Ralph B. Clark; Brock Adams, Secretary, Department of Transportation; Richard S. Page, Administrator, Urban Mass Transportation Administration; William M. Cox, Administrator, Federal Highway Administration, Defendants, No. CV 78-4734—IH.

State of California, County of Los Angeles—ss.

I, YVONNE BAGSTAD, being first duly sworn, state as follows:

1. I am the plaintiff in the above entitled matter and I am personally familiar with the facts stated herein so that if sworn as a witness I could testify thereto.

2. Both the federal and state defendants assert, erroneously, that I have unreasonably delayed the bringing of the action herein.

3. The papers on file herein reveal that on September 19 1977 the ORANGE COUNTY TRANSIT DISTRICT ("OCTD") Board of Directors awarded a contract to the Flxible Company for the manufacture of the buses involved herein.

4. The first time I became aware of the fact that OCTD had ordered buses which were non-accessible to or useable by wheelchair bound persons was when I read it in the newspaper after the contract was awarded on or about September 19, 1977. At that time I learned that the Board had

split 3 to 2. Shortly thereafter I spoke to Supervisor Riley and expressed my outrage at the decision to purchase non-accessible buses. Supervisor Riley suggested that I speak to Supervisor Clark who, in addition to being a supervisor, was a member of the Board of OCTD.

5. On or about December 14, 1977, I met with Ralph B. Clark, a director of OCTD and a member of the Board of Supervisors for the County of Orange. At that time I requested Supervisor Clark to reconsider his support for the purchase of the 65 buses which would be inaccessable to and unuseable by handicapped persons. Supervisor Clark advised me that the OCTD system was only five (5) years old and that handicapped persons could not expect it to purchase buses which are accessible to physically handicapped persons.

6. Shortly after my meeting with Supervisor Clark and sometime in December, 1977, I contacted G. R. Overton, Deputy Attorney General of the State of California and himself a handicapped person, and protested to him the purchase by OCTD of the 65 non-accessible buses. He suggested that I file a formal complaint with the Attorney General's office and I did so. In that complaint I stated in substance and effect that I thought it was illegal for the OCTD to purchase non-accessible buses with public money.

7. Prior to May 4, 1978, I repeatedly called Mr. Overton asking him what action he was taking to prevent the OCTD from going through with its purchase of the 65 non-accessible buses. He advised me that he was preparing a complaint which complaint was in fact filed in May, 1978. In connection with the filing of that action, I executed a Declaration dated May 4, 1978 relating my attempt to have Supervisor Clark change his mind concerning the purchase of the 65 buses.

8. Between the time that the Attorney General filed the complaint against OCTD in May, 1978 and the time that the preliminary injunction was denied on or about July 17, 1978, I called Mr. Overton repeatedly making inquiries about the progress of the lawsuit.

9. I was in the courtroom of the Honorable William S. Lee at the time he denied the application for preliminary injunction in July, 1978. Immediately thereafter, I discussed with Mr. Overton what steps he could next take to prevent the OCTD from taking possession of the disputed buses. He advised me that he would go ahead with the lawsuit against the OCTD. Thereafter, I continued to call Mr. Overton to inquire as to the progress of the case. He advised me that he had served the OCTD with interrogatories and would be proceeding with the matter when he received the reply to the interrogatories. He advised me that the attorney for the OCTD was continuously asking for additional time within which to reply to the interrogatories and that this was delaying matters.

10. On or about October 15, 1978, I attended an Action 504 Conference on the Human and Legal Rights of Persons with Disabilities At that conference, I sought and found Stanley Fleishman, an attorney who I knew to be active in asserting the rights of people with disabilities. At that time I discussed with Mr. Fleishman the fact that OCTD was about to take possession of 65 buses which would not be accessible to or useable by handicapped persons. I asked him if there was anything that could be done to enjoin OCTD from taking possession of these buses in light of the fact that a state Judge had denied the Attorney General a preliminary injunction. Mr. Fleishman suggested that I come to his office after the conference and discuss the matter further and I did so.

11. In the course of my consultation with Mr. Fleishman he advised me that it was his opinion that federal statutes forbade OCTD from purchasing the 65 buses at-issue. I explained to Mr. Fleishman that I could not afford to pay attorneys fees for litigation involving the buses and indeed that I could not even advance court costs. In light of that, I asked Mr. Fleishman whether he would nevertheless be in a position to file an action on my behalf. After considering the matter for a week or two and after I furnished him with some materials concerning the matter, Mr. Fleishman agreed to file an action on my behalf which action was filed on or about December 13, 1978.

12. From the time I first learned that OCTD had in September, 1977 contracted to purchase non-accessible buses, I tried in every way I knew how to prevent OCTD from taking possession of those non-accessible buses the purchase of which I believe to be in violation of both federal and state law.

Executed this 13th day of February, 1979, at Beverly Hills, California.

/s/ Yvonne Bagstad
YVONNE BAGSTAD

Subscribed and sworn to before me this 13th day of February, 1979.

/s/ Marilyn Lee
Notary Public in and for said County and State.
[SEAL]

APPENDIX H.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Paralyzed Veterans of America, etc., et al., Plaintiffs, vs. William French Smith, etc., et al., Defendants. No. 79-1979 WPG.

Filed: June 17, 1981.

This matter came on regularly for hearing on May 26, 1981 before the Honorable William P. Gray, United States District Judge presiding. Stanley Fleishman appeared for the plaintiffs, and Mark A. Chavez appeared for the defendants. The Court having examined the papers on file, and having heard the parties, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Section 504 of the Rehabilitation Act of 1973 was enacted September 26, 1973 (29 U.S.C. § 794).

2. In November 1974, the Senate Labor Committee issued a report accompanying an amendment to section 504, stating, *inter alia*, that implementing regulations should be issued by the Department of Health, Education and Welfare and that the conferees "fully expect that HEW's section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act was enacted over one year ago - September 26, 1973."

3. On April 28, 1976, President Ford issued Executive Order No. 11914 instructing HEW to implement section 504 and to coordinate the implementation of section 504 by all federal departments and agencies empowered to extend federal financial assistance to any program or activity.

4. Pursuant to Executive Order No. 11914 the Secretary of HEW issued a regulation, on January 13, 1978 "to coordinate governmentwide enforcement of section 504." (43 Fed.Reg. 2132). The regulation provides, *inter alia*, that each agency "shall issue a notice of proposed rulemaking no later than 90 days after the effective date of this part [January 13, 1978]", and "shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation." (45 C.F.R. § 85.4 (b)). At the May 26, 1981 hearing, counsel for the government conceded that each agency required to issue a section 504 regulation had the obligation to do so in 1978, no later than the end of that year.

5. Commencing in October 1978, the Secretary of HEW notified the agencies required to issue a 504 regulation of their obligation under the law.... A written notification (attached to the complaint as Appendix A) reads in part:

> "On January 3, 1978, I signed a regulation implementing the Executive Order (43 FR 2132, January 13, 1978). The regulation provides, among other things, that each department and agency extending financial assistance must issue a Notice of Proposed Rulemaking no later than April 13, 1978, and issue a final regulation within 135 days from the end of the comment period. It also provides that the department or agency shall submit its proposed final regulation to this Department's Office for Civil Rights for review at least 45 days before it is to be submitted.
>
> It is my understanding that your Department has not yet published its proposed regulation implementing Section 504 in the *Federal Register*. I urge you to give this matter your immediate attention and priority. Section 504 reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. Its intent is to usher

in a new era of equality for handicapped individuals. The prompt issuance of regulations implementing Section 504 is essential to fulfilling this Administration's commitment to handicapped persons."

6. The plaintiffs filed this action on May 30, 1979 for an order, *inter alia*, directing the head of each of the agencies required to do so to issue a final section 504 regulation without any further delay, and requiring the head of each such agency to immediately notify recipients of federal financial assistance through said agencies that they are required, in the interim, to comply with the section 504 regulation issued by HEW on June 3, 1977 (45 C.F.R. Part 84). The agencies named in the complaint include: (1) Department of Defense; (2) General Services Administration; (3) Department of Housing and Urban Development; (4) Department of Commerce; (5) Civil Aeronautics Board; (6) National Endowment for the Humanities; (7) Department of Interior; (8) Department of Agriculture; and (9) National Science Foundation. The government admits that each of the said nine agencies grant federal financial assistance, are obliged to issue section 504 regulations, and have not yet done so.

7. The federal agencies have experienced considerable delay in issuing section 504 regulations.

8. It is likely that Plaintiffs, and handicapped persons throughout the nation, have been harmed by the unreasonable delay in issuing section 504 regulations. Congress contemplated speedy implementation of section 504 through regulations to achieve the purposes of the Act. (See, S.Rep. No. 93-1139, 93rd Cong., 2d Sess. 24-25 (1974); H.R.Rep. No. 32-1457, 93rd Cong., 2d Sess. 27-28 (1974); S.Rep. No. 32-1297, 93rd Cong., 2d Sess. 29-40 (1974). HEW, in issuing the lead section 504 regulation, as applicable to recipients of federal financial assistance from that agency, stated that section 504, and the regulations implementing

it, "will open a new world of opportunity for more that 35 million handicapped Americans - . . . . It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law." (45 C.F.R. Part 84). When the Secretary of HEW issued the guideline regulation for other federal agencies, on January 13, 1978, he made the regulation effective immediately, departing from the normal 30 day waiting period, "because the government-wide implementation of section 504 should proceed without further delay." (43 Fed.Reg. 2136). The failure of the nine agencies to issue final section 504 regulations denies qualified handicapped persons of equal employment opportunities with recipients of federal financial assistance, and denies handicapped persons access to programs and activities of recipients of federal financial assistance.

9. Plaintiffs are plainly right on the merits. Each of the nine agencies grants federal financial assistance, and each is required to issue a timely section 504 regulation. At the latest the regulations should have been promulgated by the end of 1978. Five of the nine agencies did not even issue a *proposed* section 504 regulation in 1978: Department of Interior proposed regulation April 8, *1980* (45 Fed.Reg. 24075); Department of Defense proposed regulation October 11, 1979 (44 Fed.Reg 58750); General Services Administration proposed regulation October 30, 1979 (44 Fed.Reg. 62298); Department of Agriculture proposed regulation January 22, 1979 (44 Fed.Reg. 4620); Civil Aeronautics Board proposed regulation June 6, 1979 (44 Fed.Reg. 32401).

10. The balance of hardships tips sharply in plaintiffs' favor. Section 504 is the first major federal law protecting the civil rights of handicapped persons. It attacks the discrimination, the demeaning practices, and the injustices that have afflicted the nation's handicapped citizens. It reflects

the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities, if they are not subjected to discrimination. Failure of the nine agencies to issue section 504 regulations is contrary to law and contrary to national policy. The failure deprives handicapped individuals of rights and opportunities Congress meant them to have. On the other hand, the government will suffer no hardship by reason of the Court granting the relief sought by plaintiffs. The order made herein does not interfere with the operation of government in any manner.

11. Injunctive relief is appropriate in this case because plaintiffs have no adequate remedy at law.

12. Wherever necessary or appropriate a finding of fact may be deemed a conclusion of law.

CONCLUSIONS OF LAW

1. The following agencies had a duty to issue final section 504 regulations by the end of 1978:

Department of Defense
General Services Administration
Department of Housing and Urban Development
Department of Commerce
Civil Aeronautics Board
National Endowment for the Humanities
Department of Interior
Department of Agriculture
National Science Foundation

The agencies have not yet issued said regulations. In failing to issue final section 504 regulations the agencies are guilty of unreasonable delay in affording plaintiffs, and handicapped persons generally, of rights granted by Congress.

2. Plaintiffs are entitled to a preliminary injunction requiring the Departments of Agriculture, Commerce, Inte-

rior, Housing and Urban Development and Defense, the Civil Aeronautics Board, General Services Administration, National Endowment for the Humanities, and the National Science Foundation to:

A. Publish final regulations implementing section 504 (29 U.S.C. § 794) on an expedited basis;

B. Publish in the Federal Register a notice addressed to all recipients of federal financial assistance from the respective agencies informing such recipients that they are required to comply with the provisions of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), even though the defendant agencies have not yet issued final regulations implementing section 504; and

C. Send a letter to all future recipients of federal financial assistance notifying such recipients that they are required to comply with the provisions of section 504 prior to the issuance of the final agency section 504 regulations.

3. Plaintiffs, as the prevailing parties, are entitled to reasonable attorney's fees pursuant to 29 U.S.C. § 505a(b).

Dated: June 16, 1981.

/s/ William P. Gray,
WILLIAM P. GRAY,
UNITED STATES DISTRICT JUDGE.

Opposition

1

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-590

IN THE

Supreme Court of the United States

October Term, 1981

YVONNE BAGSTAD, on behalf of herself, and all other persons similarly situated,

Petitioner,

vs.

ORANGE COUNTY TRANSIT DISTRICT; JAMES REICHERT; ROBIN YOUNG; PHILIP ANTHONY; AL HOLLINDEN; WILLIAM FARRIS; RALPH B. CLARK; ANDREW L. LEWIS, Secretary, Department of Transportation; ARTHUR E. TEELE, JR., Administrator, Urban Mass Transportation Administration; RAY BARNHART, Administrator, Federal Highway Administration,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LOCAL RESPONDENTS' BRIEF IN OPPOSITION.

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No. 81-590

IN THE

Supreme Court of the United States

October Term, 1981

YVONNE BAGSTAD, on behalf of herself, and all other persons similarly situated,

Petitioner,

vs.

ORANGE COUNTY TRANSIT DISTRICT; JAMES REICHERT; ROBIN YOUNG; PHILIP ANTHONY; AL HOLLINDEN; WILLIAM FARRIS; RALPH B. CLARK; ANDREW L. LEWIS, Secretary, Department of Transportation; ARTHUR E. TEELE, JR., Administrator, Urban Mass Transportation Administration; RAY BARNHART, Administrator, Federal Highway Administration,

Respondents.

LOCAL RESPONDENTS' BRIEF IN OPPOSITION.

Respondents Orange County Transit District, James Reichert, Robin Young, Philip Anthony, Al Hollinden, William Farris and Ralph B. Clark (hereinafter referred to as "Local Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's unpublished Memorandum in this case. That Memorandum is reprinted as Appendix (A) to the Petition for Writ of Certiorari filed by Petitioner Yvonne Bagstad (hereinafter referred to as "Petitioner").

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The Decision of the Ninth Circuit Court of Appeals Does Not Conflict With the Decisions of Other Circuit Courts of Appeal or Other Decisions of the Ninth Circuit.

Summary Judgment in the instant matter was initially awarded in favor of Local Respondents upon two alternative grounds: Petitioner's laches, and compliance by both Federal and Local Respondents with all applicable laws and regulations.[1] But as correctly stated by Petitioner, the Ninth Circuit Court of Appeals did not reach the question of Respondents' compliance with applicable laws and regulations. The District Court's decision was affirmed in an unpublished Memorandum solely on the ground of laches. Therefore, the question of conflicting decisions concerning the application of the Urban Mass Transportation Act (UMT Act), the Federal Aid-Highway Act (FAHA), and Section 504 of the Rehabilitation Act (Section 504), does not arise because the issue was not addressed by the Court of Appeals in its decision below. Hence the underlying premise of Petitioner's argument that the decision of the Ninth Circuit Court of Appeals is in conflict with its own previous decisions as well as those of other Circuit Courts of Appeal can only apply to the issue of laches.

Examination of the authority cited by Petitioner in her Petition in support of the existence of a conflicting decision

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[1]The Federal Respondents consist of Andrew L. Lewis, Secretary, Department of Transportation; Arthur E. Telle, Jr., Administrator, Urban Mass Transportation Administration; Ray Barnhart, Administrator, Federal Highway Administration. These named federal officials have been substituted for Brock Adams, former Secretary, Department of Transportation, Richard S. Page, former Administrator, Urban Mass Transportation Administration, and William M. Cox, former Federal Highway Administration Administrator, pursuant to Fed. R. App. P. 43(c).

on the issue of laches reveals her premise to be false. The principal cases relied upon by Petitioner as allegedly in conflict with the decision in the instant matter are simply not on point.

In *Fowler v. Blue Bell, Inc.*, 596 F.2d 1276 (5th Cir. 1979) and *Powell v. City of Key West, Florida*, 434 F.2d 1075 (5th Cir. 1970) claims of laches were rejected specifically because the prejudice to the defendants in each case was caused by their own lack of diligence or disregard of administrative regulations and not by reason of the plaintiff's delay, in contrast to the instant matter where prejudice resulted to Local Respondents solely because of Petitioner's delay in bringing suit.

The court in *Hurst v. United States Postal Service*, 586 F.2d 1197 (8th Cir. 1978) found it unnecessary to even address the issue of the plaintiff's delay since the destruction of records (and therefore the prejudice) was caused by the Postal Service, pursuant to its own regulation, and not by reason of any delay by the plaintiff in filing suit.

Baker v. Bell, 630 F.2d 1046 (5th Cir. 1980) does not deal with the issue of laches and, far from supporting Petitioner's position, would appear to support the action of the Court below. Therein the Court affirmed summary judgment in favor of the Local Defendants with respect to their compliance with the UMT Act and the purchase of 185 buses, of which 175 were not accessible to the handicapped. The Court reversed the judgment in part with respect to Section 504 of the Rehabilitation Act after concluding that, "the implication of a private cause of action and the judicial standard applicable thereto were neither brought to the attention of the trial court nor addressed by its decision." *Id.* at 1055.

The Court then went on to state, "We express no opinion whether upon completion of discovery, there will be genuine issues of material fact requiring a trial on the merits of the cause of action implied in Section 504 or whether the material facts will be so pellucid as to permit summary judgment." *Id.* at 1057.

In three of the environmental decisions relied upon by Petitioner the Courts of Appeal declined to invoke the doctrine of laches citing the public interest status accorded ecology preservation by the Congress. In all three instances, irreparable environmental harm was threatened. *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 868 (5th Cir. 1975); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1329 (4th Cir. 1972); *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). Petitioner has cited no authority recognizing a similar hesitancy on the part of the courts to invoke the doctrine of laches in a factual setting similar to the instant matter. In fact, the Court in *Shiffler v. Schlesinger*, 548 F.2d 96 (3rd Cir. 1977), the fourth environmental case cited by Petitioner, affirmed summary judgment against the Plaintiff (based in part on its reasoning that injunctive relief was barred by the doctrine of laches), and stated that, in view of the important congressional policies embodied in the National Environmental Protection Act, the District Court was obligated to, "consider whether there has been inexcusable delay in instituting suit and prejudice to the public interest resulting therefrom." *Id.* at 103.

It was uncontested in the District Court below that Local Respondents first announced on February 7, 1977, their intention to purchase buses not equipped with wheelchair lifts. It was further uncontested that on September 19, 1977, Local Respondents awarded a contract for the acquisition of 65 buses without wheelchair lifts. In her affidavit filed

in support of her motion for a preliminary injunction, Petitioner affirmed that she learned of this contract on or about September 17, 1977.[2]

Thereafter, Petitioner contacted Deputy Attorney General G. R. Overton. The Office of the Attorney General of the State of California filed suit on behalf of the State in May, 1978, eight months after the order for the buses had been placed. On July 13, 1978, the application of the Attorney General of the State of California for a preliminary injunction to enjoin the acquisition of the 65 buses without lifts was denied in State Court, the denial based in part upon Petitioner's laches.

Approximately one year after meeting with Deputy Attorney General G. R. Overton, Petitioner met with her present attorney. The instant action was filed on December 13, 1978, after the buses were in production, and fifteen months after the contract had been awarded. Local Respondents began taking possession of the finished buses two months after Petitioner instituted her suit, pursuant to the contract awarded seventeen months earlier.

The Court below recognized that these facts were uncontested by Plaintiff in the District Court and that, by reason of the substantial delay of the Petitioner in filing her action, retrofitting the buses with lift devices would cause both a significant disruption in the public transit services which utilize the subject buses, and a significant increase in costs. Although Petitioner asserts that there was nothing in the record to support the proposition that retrofitting of the buses would significantly disrupt the operation of the transit system, the declaration of Patrick H. Butters, Manager of Maintenance for Local Respondents from 1976 to

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[2]See paragraph 4 of appendix G accompanying the Petition for Writ of Certiorari.

1978, filed in opposition to Plaintiff's application for a preliminary injunction in February, 1979, specifically itemized the areas of service which would be disrupted should a delay in the delivery of the 65 buses occur. Mr. Butters' declaration also pointed out the cost savings which would be lost if retrofitting were required. In addition, Federal Respondents, in their papers opposing Petitioner's second application for preliminary injunction, made reference to the economic impact statement attached to the Department of Transportation's proposed Section 504 regulations, estimating the retrofitting cost to be in a sum of $2,000.00 per bus, plus the cost of the lift. Hence, the Ninth Circuit Court of Appeals had before it not only uncontested evidence of the delay and disruption of the system, but, in addition, the actual estimated cost for retrofitting the buses. Even without this evidence, "the bare fact of delay creates a rebuttable presumption of prejudice." *Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979).

Upon examination, the purported existence of a conflict asserted by Petitioner evaporates, and her Petition for Writ of Certiorari should therefore be denied. See *Arlington Inc. v. Mayer*, 339 U.S. 965 (1950).

2. Neither the Decision Below nor the Record Raise the Questions Presented in the Petition Concerning the District Court's Interpretation of the UMT Act, FAHA and Section 504.

Although Petitioner states emphatically that the District Court was in error in several respects with regard to the application of the provisions of the UMT Act, FAHA and Section 504, the record does not support such a determination. The Declaration of Robert C. Hartwig filed by Local Respondents in support of their motion for summary judgment demonstrated that Local Respondents did not receive

any funds from the Federal Highway Administration. At no time did Petitioner dispute this fact. Without some assurance from the record that funds were received by Local Respondents from the Federal Highway Administration, the Questions Presented in the Petition as to Petitioner's rights under FAHA are merely hypothetical. The only proper issue before the District Court was whether Local Respondents had complied with requirements of the UMT Act, Section 504 and the regulations promulgated thereunder. The District Court did in fact apply the standards imposed under Section 504 of the Rehabilitation Act, in addition to those imposed under the UMT Act, ultimately concluding that Local Respondents had fully complied with the applicable requirements.[3] Thus missing from this case is the essential factual predicate of the Petitioner's Questions Presented — that is, the facts demonstrating that Petitioner's rights under FAHA, the UMT Act or Section 504 were violated or ignored by the District Court in reaching its decision.[4]

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[3]See discussion of the District Court on pages 10-12 of appendix C accompanying the Petition for Writ of Certiorari.

[4]Petitioner has also argued that the District Court erred in concluding that Local Respondents were in full compliance with the regulations issued by the Department of Transportation on April 30, 1976. Petitioner did not challenge any of the evidence adduced by Local Respondents to demonstrate their compliance with the regulations. Indeed, Petitioner offered no admissible evidence to refute the facts proven by Local Respondents in support of their motion for summary judgment. In any event, the regulations issued on April 30, 1976, were superceded by additional regulations promulgated by the Department of Transportation in 1979, which themselves became a subject of further litigation in *American Public Transit Association, et al. v. Andrew L. Lewis, Jr., Secretary of the United States Department of Transportation, et al.*, 655 F.2d 1272 (D.C. Cir. 1981). On July 20, 1981, the 1979 regulations relating to mass transit were rescinded and new regulations issued. (*See*, 46 Fed. Reg. 37488). Hence any possibility that resolution of the present litigation will have an effect on any persons other than the parties to this action is extremely remote, since consideration of the 1976 regulations will not directly impact on the validity of the current regulations.

CONCLUSION.

For these reasons, Local Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROURKE & WOODRUFF,
ALAN R. WATTS,
KENNARD R. SMART, JR.,
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Opposition

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No. 81-590

In the Supreme Court of the United States

OCTOBER TERM, 1981

YVONNE BAGSTAD, ON BEHALF OF HERSELF, AND ALL OTHER PERSONS SIMILARLY SITUATED, PETITIONER

v.

ORANGE COUNTY TRANSIT DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, a handicapped individual, contends that the court of appeals erred in sustaining the district court's ruling that laches barred her action to enjoin the Orange County Transit District's purchase of buses that are not equipped with wheelchair lifts. She also contends that the court of appeals should have decided whether, at the time her complaint was filed in December 1978, federal law mandated the provision of transportation services for mobility-handicapped persons through "mainstreaming" into regular fixed-route transportation services, rather than through alternative, specialized "door-to-door" services.[1]

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[1]The regulations then in effect (49 C.F.R. Part 609 (1976)) were adopted by the Urban Mass Transportation Administration in 1976. See also 23 C.F.R. 450.320 and 49 C.F.R. 613.204.

1. The district court granted respondents' motions for summary judgment, both because respondents had complied with applicable statutory provisions and regulations and because petitioner's complaint was barred by laches (Pet. App. 6-13). The court of appeals did not reach the substantive grounds upon which the district court relied, but affirmed the judgment on the laches ground in an unpublished memorandum opinion (*id.* at 1-3). Both courts below having decided this fact-bound issue adversely to petitioner (*id.* at 2-3, 10), further review is clearly unwarranted. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi* v. *Immigration Director*, 385 U.S. 630 (1967).

2. At all events, there is no merit to petitioner's substantive claim that federal law requires "mainstreaming" to provide public transportation for handicapped persons.[2] No federal court has ever held that federal law requires "mainstreaming" for transportation of the handicapped.[3] Moreover, in *American Public Transit Association* v.

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[2]Petitioner contends (Pet. 14-20) that Section 16 of the Urban Mass Transportation Act of 1964 ("UMT Act"), 49 U.S.C. 1612; Section 165(b) of the Federal-Aid Highway Act of 1973 (FAHA), 23 U.S.C. 142 note; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, require the granting of the relief she sought below. However, none of the funds for the bus purchases at issue here were provided under 23 U.S.C. 142, and that Section is therefore irrelevant to this action.

[3]See, *e.g.*, *American Public Transit Association* v. *Lewis*, 655 F. 2d 1272 (D.C. Cir. 1981); *Baker* v. *Bell*, 630 F. 2d 1046 (5th Cir. 1980); *Snowden* v. *Birmingham-Jefferson County Transit Authority*, 407 F. Supp. 394 (N.D. Ala. 1975), aff'd without opinion, 551 F. 2d 862 (5th Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F. 2d 413 (8th Cir. 1977); *Dopico* v. *Goldschmidt*, 518 F. Supp. 1161 (S.D. N.Y. 1981), appeal docketed, No. 81-6172 (2d Cir. Aug. 31, 1981); *Atlantis Community, Inc.* v. *Adams*, 453 F. Supp. 825 (D. Colo. 1978); *Bartels* v. *Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977); *Vanko* v. *Finley*, 440 F. Supp. 656 (N.D. Ohio 1977); *Michigan Paralyzed Veterans of America* v. *Coleman*, 451 F. Supp. 7 (E.D. Mich. 1977).

Lewis, 655 F. 2d 1272 (1981), the District of Columbia Circuit recently held that the Department of Transportation's 1979 regulations (49 C.F.R. Part 27 (1979)), which mandated "mainstreaming" by requiring facilities to be "accessible" to handicapped persons confined in wheelchairs, were not authorized by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794.[4]

As a result of the decision in *American Public Transit Association* v. *Lewis, supra*, those federal regulations and guidelines requiring mainstream accessibility in mass transportation have been withdrawn or suspended.[5] Furthermore, for the purposes of complying with this decision, the Department of Transportation published an interim final regulation on July 20, 1981. The new regulation requires that transit authorities make "special efforts" to provide transportation services to the handicapped, but it does not require "mainstreaming."[6] On the same date, the

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[4]In considering the validity of the 1979 regulations, the court of appeals relied primarily on this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and concluded (655 F. 2d at 1277) that Section 504 does not require such significant financial burdens as were involved in implementing the "mainstreaming" regulations. See also *Dopico* v. *Goldschmidt*, 518 F. Supp. 1161 (S.D. N.Y. 1981), appeal docketed, No. 81-6172 (2d Cir. Aug. 31, 1981).

[5]Although the case was remanded to the district court to consider whether the 1979 regulations were based on the UMT Act or FAHA, the action was subsequently dismissed by agreement in August 1981. At approximately the same time, the Department of Justice suspended that part of the government-wide guidelines, previously adopted by the Department of Health and Human Services, that required mainstream accessibility in any federally-funded transportation systems. See 46 Fed. Reg. 40686 (1981).

[6]In the preamble to the interim regulations, the Department of Transportation noted that the UMT Act and FAHA may permit—but do not require—the affirmative action required by the 1979 regulations (46 Fed. Reg. 37488 (1981)).

Department of Transportation initiated a notice and comment rulemaking proceeding that will culminate in the promulgation of new permanent regulations (see 46 Fed. Reg. 37488). The comment period closed on September 18, 1981 (*ibid.*), and the Department is now engaged in formal rulemaking that will address the same issues that petitioner seeks to have decided by this Court. Review is therefore unwarranted at the present time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1981

DOJ-1981-12

Amicus Brief

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

and

BRIEF OF AMICUS CURIAE PARALYZED VETERANS OF AMERICA

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Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Paralyzed Veterans of America ("PVA"), of 4350 East-West Highway, Bethesda, Maryland 20814, respectfully moves the Court, pursuant to Rule 36 of the Rules of the United States Supreme Court, for permission to file the attached brief amicus curiae for the reasons set forth below.

PVA is a federally chartered non-profit corporation with voting membership limited to state chapters comprising non-profit associations of veterans of the United States Armed Forces who have suffered spinal cord injury or disease.

An express purpose of PVA is to aid its members by acquainting the public on a national scale with the needs and problems of paraplegics, and to advocate complete and effective reconditioning programs for its members and for other paraplegics. PVA is authorized to take any actions necessary or advisable to realize its objectives of rehabilitation, reconditioning and vocational education for paraplegics.

To further these objectives, PVA participates in lawsuits and in legislative monitoring and lobbying on behalf of the mobility-impaired handicapped. PVA believes that adequate transportation services are an essential prerequisite to

any program ensuring paraplegics basic opportunities in the community at large.

Because of its history of participation in the processes of the federal government, PVA respectfully submits that it is able to contribute to the elucidation of issues in this Petition for Certiorari.

WHEREFORE PVA, by counsel, respectfully prays that this Court grant leave to file the attached Brief as Amicus Curiae.

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The unpublished opinion of the United States Court of Appeals for the Ninth Circuit, Bagstad v. Orange County Transit District, et al., No. CV 79-3426 (filed May 6, 1981), is reproduced as Appendix B to the Petition for Writ of Certiorari in this action.

The reporter's transcript of the oral Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California, the Honorable Irving Hill presiding, in Bagstad v. Orange County Transit District, et al., No. CV 78-4734 (June 13, 1979) (order granting summary judgment for defendants) is reproduced as Appendix C to that same Petition.

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Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit

BRIEF OF THE PARALYZED VETERANS OF AMERICA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Paralyzed Veterans of America ("PVA") is a congressionally chartered veterans service organization. PVA has 35 chapters throughout the nation and represents 11,000 veteran members with

injuries or diseases of the spinal cord. All of PVA's members are handicapped within the meaning of section 504 of the Rehabilitation Act of 1973, at issue in this action.

PVA, among other goals, works to eliminate physical barriers which restrict mobility-impaired persons from working, learning and participating in the life of the community. Many of PVA's members live where they cannot use available mass transportation. They cannot therefore fully benefit from the programs and services which PVA provides to its membership, and, ultimately, their ability to lead independent and productive lives is compromised. PVA and its members are, therefore, vitally interested in ensuring that mass transportation in the United States is accessible to the handicapped.

STATEMENT OF THE CASE

On December 13, 1978, Petitioner Bagstad, a mobility-impaired resident of Orange County, California, filed suit in the United States District Court for the Central District of California against the Orange County Transit District ("OCTD") and the United States Department of Transportation ("DOT"). The suit alleged that OCTD, with the approval of DOT, contracted to buy 65 mass-transit buses which were inaccessible to the handicapped. This purchase violated section 16 of the Urban Mass Transportation Act ("UMTA"), section 165 of the Federal Aid Highway Act ("FAHA"), and section 504 of the Rehabilitation Act of 1973. On June 11, 1979, the District Court granted the Respondents' motion for summary judgment on the grounds that (1) Petitioner was

guilty of laches; (2) neither section 16 of UMTA nor section 165 of FAHA requires Respondents to provide buses which are accessible to handicapped persons; (3) section 504 of the Rehabilitation Act was inapplicable to this case; and (4) Respondents were not required to comply with DOT's 1980 regulations requiring buses to be equipped with wheelchair lifts. The United States Court of Appeals for the Ninth Circuit affirmed only the District Court's holding on laches and did not address the other issues raised in its opinion.

In their Petition for Certiorari, Petitioner has convincingly demonstrated that the Court of Appeals erred in affirming the District Court's holding on laches. Moreover, Petitioner has also convincingly demonstrated that, in

the interests of judicial economy and in the exercise of its supervisory powers, this Court should address the issues left unanswered by the Court of Appeals and decided by the District Court. It is in support of a review by this Court of those issues that this brief is addressed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT SECTION 504 OF THE REHABILITATION ACT OF 1973 PERMITTED RESPONDENTS TO PURCHASE BUSES INACCESSIBLE TO HANDICAPPED PERSONS

The District Court's holding that section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, et seq., ("Rehabilitation Act") permitted the Respondents to purchase sixty-five buses without wheelchair lifts is clearly erroneous. To the contrary, the Orange County Transit District's failure to

purchase accessible buses when federal dollars were provided for their purchase is precisely the type of action section 504 of the Rehabilitation Act was intended to eliminate.

Explicitly reflecting a Congressional awareness of the need to protect the rights of the handicapped, section 504 of the Rehabilitation Act parallels the language of section 604 of the Civil Rights Act of 1964, 2 U.S.C. § 2000d-1. Section 504 reads in pertinent part:

> "No otherwise qualified handicapped individual in the United States. . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . ."

Section 504 was clearly intended to be a broad charter providing civil

rights to the handicapped in a similar manner to the statute banning racial discrimination by recipients of federal funds. Senator Hubert Humphrey, the primary sponsor of the Senate version of section 504, stated: "I introduce. . . a bill. . . to ensure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving federal financial assistance. . ." 118 Cong. Rec. 525 (1972) Senator Humphrey noted that the incorporation of the protections and prohibitions of the bill would be included in a bill amending the Rehabilitation Act rather than amending the Civil Rights Act, as originally intended. "I am deeply grateful at the inclusion of these provisions which carry through the intent of the original [Civil Rights] bills. . . to end the

virtual isolation of millions of children and adults from society." 118 Cong. Rec. 32310 (1972).

Similarly, Congressman Vanik, the chief sponsor of section 504's predecessor in the House of Representatives, explained: "In an effort to provide increased assistance and equal opportunity for the handicapped of our Nation, I am today introducing legislation to provide equal treatment of the handicapped in all programs which receive Federal assistance." 117 Cong. Rec. 45974 (1971). (emphasis added)

However, Congress recognized that discrimination against the handicapped could take different forms from discrimination against other minority groups. The handicapped could be segregated from the rest of society, not by intent, but simply because of the failure of recipi-

ents of federal funds to provide facilities accessible to handicapped people. The legislative history of the 1974 amendments to the Rehabilitation Act specifically indicates that section 504 was intended to redress such a result by requiring a recipient of federal funds to meet the special needs of the handicapped. The Senate Labor and Public Welfare Committee stated that ". . . where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." (emphasis added). S. Rep. No. 93-1297, 93d Cong., 2d Sess. at 37 (1974). This statement, which acknowledges the fact that Congress recognized that passive nondiscrimination alone would not help handicapped persons, was followed by an unequivocal directive to

take such affirmative steps with mass transportation:

> "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational and rehabilitation services, in relation to federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs." Id. at 38 (Emphasis added).

In the instant situation, in order not to discriminate against mobility-impaired users of buses, the OCTD was required by section 504 of the Rehabilitation Act to take such affirmative action - namely ensure that the buses it purchased were equipped with wheelchair lifts. */ Only by such actions could

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*/ Amicus will demonstrate infra that Respondents' obligation not to discriminate was not satisfied by providing a separate fleet of buses exclusively for the use of the handicapped.

the handicapped ever use those buses on an equal basis with the non-handicapped; mere passive non-discrimination is ipso facto insufficient to satisfy section 504.

Southeastern Community College v. Davis, 442 U.S. 397 (1979) is not to the contrary. There a hearing impaired woman applied for admission to a college nursing program receiving federal funds. She was not admitted because the school concluded that her hearing impairment would interfere with her participation in the clinical portion of her training. The Supreme Court upheld the school's action, holding, inter alia, that the school was not obliged to provide extensive individual supervision and to modify its program to accomodate the plaintiff. As the Court stated:

"[N]either the language, purpose, nor history of section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." Id at 411.

Davis does not, however, preclude any affirmative action by a recipient of federal funds to eliminate discrimination against the handicapped. Even in Davis, the Court acknowledged that "on occasion the elimination of discrimination [under section 504] may involve some costs. . ." Id at 411, n. 10. Moreover, in American Public Transit Association v. Lewis, No. 80-1497 (D.C. Cir. May 26, 1981), the United States Court of Appeals for the District of Columbia considered the application of the Davis case to mass transportation. Although the Court ultimately decided that the applicable

regulations under review required too vast an expenditure to accomodate the handicapped and were therefore invalid, the Court did state that Davis noted that "failure to take affirmative action might be discriminatory when programs could be opened to the handicapped without imposing undue financial and administrative burdens upon a State." Slip op. at 12 citing Davis at 412. While applying Davis to public transit, the Court of Appeals stated that "at some point a transit system's refusal to take modest affirmative steps to accomodate handicapped persons might well violate section 504." Id.

The 'modest affirmative steps' Petitioners were seeking here were precisely the type of actions necessary to eliminate discrimination against the

mobility-impaired. At a relatively small cost, the buses purchased by the OCTD could have been equipped with wheelchair lifts. With these lifts, the buses would be accessible to those in wheelchairs. Without them, the handicapped were effectively barred from their use. Section 504, therefore, prohibited the purchase of the buses without lifts.

II. THE DISTRICT COURT ERRED IN HOLDING THAT RESPONDENTS DID NOT VIOLATE SECTION 16 OF THE URBAN MASS TRANSIT ACT OF 1964 OR SECTION 165(b) OF THE FEDERAL AID HIGHWAY ACT OF 1973

The District Court also held that Respondents, in failing to ensure that the sixty-five buses purchased by the OCTD were equipped with wheelchair lifts, did not violate either section 16 of the Urban Mass Transit Act of 1964,

as amended, 49 U.S.C. § 1601, et seq. ("UMTA") or section 165(b) of the Federal Aid Highway Act of 1973, as amended, 23 USC § 101, et seq. ("FAHA") Both holdings are clearly erroneous.

Section 16(a) of UMTA declares that the elderly and handicapped are "to have the same right as other persons to utilize mass transportation facilities and services" and requires "special efforts" to be made to assure their availability to the handicapped. 49 USC § 1612(a). (Emphasis added). The author of this amendment, Congressman Biaggi, explained it thus:

> "This amendment would require all federally assisted mass transit facilities to meet the need of the elderly and the handicapped.
>
> * * *
>
> The present designs of mass transit systems

> are such that some 44 million Americans will be excluded from using them. These Americans are elderly citizens, handicapped persons, cardiac patients, accident victims, and many others who are hindered in their movements by age or physical impairment.
>
> * * *
>
> I cannot overemphasize the importance of establishing a national policy to aid these elderly and handicapped persons so that they might have the same equal right of access to public transportation facilities that other Americans have. . . ." 116 Cong. Rec. 34180 (1970) (emphasis added).

By providing buses without lifts, which the mobility-impaired are completely unable to use, Respondents have totally failed to provide the "same equal rights of access to public transportation facilities" that section 16 of UMTA

obliges them to provide. Under no conceivable circumstances can it be said that a person confined to wheelchair has an "equal right of access" with a non-handicapped person to a bus into which he cannot get his wheelchair. Respondents' actions thus violated section 16 of UMTA.

Similarly section 165(b) of the FAHA requires the Secretary of Transportation to ensure that "mass transportation facilities" receiving federal aid "can be effectively utilized by . . . handicapped persons. . ." Again, under no conceivable circumstances, can a bus without a wheelchair lift be used by someone in a wheelchair. Respondents were, therefore, in clear violation of the FAHA in purchasing with federal funds buses without wheelchair lifts.

III. THE DISTRICT COURT ERRED IN HOLDING THE PROVISION OF A SEPARATE TRANSPORTATION SYSTEM FOR THE HANDICAPPED SATISFIED RESPONDENTS' OBLIGATIONS

The District Court evidently believed that the OCTD's provision of a fleet of special buses for handicapped commuters in Orange County satisfied its obligations under the various statutes prohibiting discrimination against the handicapped. This belief is, however, unsupportable.

First, nothing in the legislative history of any of the relevant provisions indicates that non-discrimination against the handicapped would be equated with access to a separate transportation system. Indeed, the author of section 16 of UMTA specifically intended not to permit such separate systems. Congressman Biaggi stated:

> Other proposals have been offered that would set up special transportation facilities for the elderly and handicapped. Others would provide subsidies so that these people could use more expensive services such as taxicabs or limousines.
>
> However, besides the factor of costs for these programs, they would further serve to segregate the elderly and the handicapped from our society. 116 Cong. Rec. 34181 (1970) (emphasis added).

More importantly, 'separate but equal' has no place in any interpretation of a statute to guarantee a person's civil rights. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court had held that the provision of separate facilities for blacks on public transportation did not violate the Constitution. In Brown v. Board of Education 374 U.S. 483 (1954) the Supreme Court reversed

Plessy and held that "separate" is "inherently unequal." Id. at 495. The District Court in this action, by permitting Respondents to maintain a dual system of transportation, one for the handicapped and the other for the non-handicapped, relies on a concept of equality long ago discarded and discredited. The Petition for Certiorari should therefore be granted and the case remanded to the Ninth Circuit with instructions to reverse the judgment of the District Court.

Conclusion

This case raises important questions concerning the rights of millions of handicapped persons under section 504 of the Rehabilitation Act, section 16 of UMTA and section 165(b) of FAHA. Handicapped persons, deprived of effective

transportation services, face the unwarranted denial of many of the benefits enjoyed by other members of society. Congress clearly intended a contrary result, yet the opinion of the District Court below flies in the face both of the statutory language and the manifest Congressional intent behind it. Because of the vital importance of the issues raised herein, PVA respectfully urges this Court grant Petitioner the requested Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28, the undersigned hereby certifies that on October 24, 1981 three copies of the foregoing Motion For Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae were served by depositing the same in the United States Mail with first class postage prepaid, addressed to counsel of record at their post office addresses as follows:

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